



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

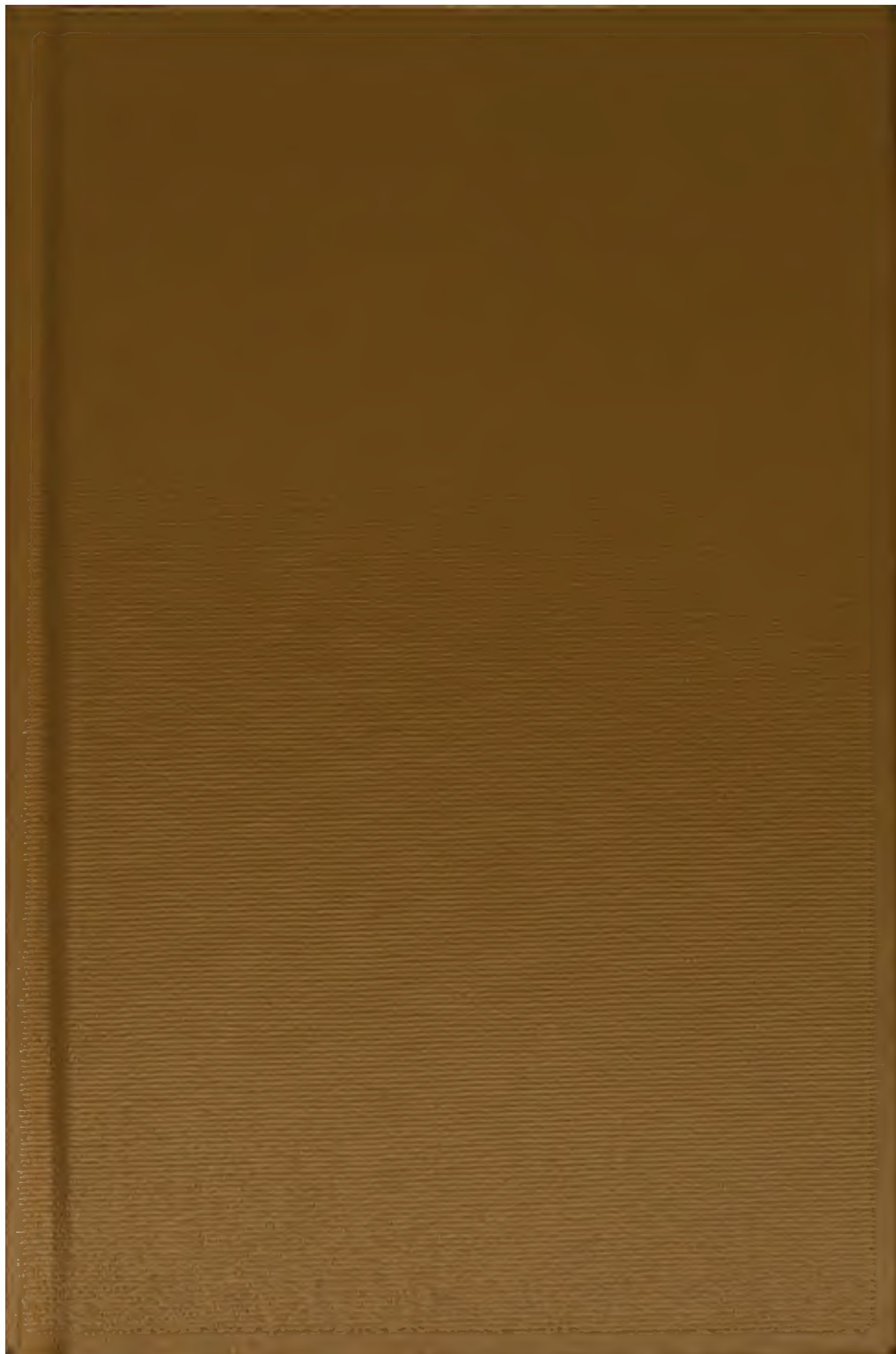
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



ED
AHB
JWH

The Hornbook Series

Of elementary treatises on all the principal subjects of the law. The special features of these books are as follows:

1. A succinct statement of leading principles in black-letter type.
2. A more extended commentary, elucidating the principles.
3. Notes and authorities.

Published in regular octavo form, and sold at the uniform price of

\$3.75 per volume, including delivery.

-
1. *Norton on Bills and Notes.* (2d Edition.)
 2. *Clark's Criminal Law.*
 3. *Shipman's Common-Law Pleading.* (2d Edition.)
 4. *Clark on Contracts.*
 5. *Black's Constitutional Law.* (2d Edition.)
 6. *Fetter on Equity.*
 7. *Clark on Criminal Procedure.*
 8. *Tiffany on Sales.*
 9. *Glenn's International Law.*
 10. *Jaggard on Torts.* (2 vols.)
 11. *Black on Interpretation of Laws.*
 12. *Hale on Bailments and Carriers.*
 13. *Smith's Elementary Law.*
 14. *Hale on Damages.*
 15. *Hopkins on Real Property.*
 16. *Hale on Torts.*
 17. *Tiffany on Persons and Domestic Relations.*
 18. *Croswell on Executors and Administrators.*
 19. *Clark on Corporations.*
 20. *George on Partnership.*
 21. *Shipman on Equity Pleading.*
 22. *McKelvey on Evidence.*

To follow: Handbooks of the Law of Code Pleading, Federal Procedure, Private International Law, Insurance, Personal Property, Wills, Patents, Extraordinary Remedies, Negligence, Municipal Corporations, Roman Law, Agency.

Other subjects in preparation to be announced later.

Published and for sale by

West Publishing Co., St. Paul, Minn.

HANDBOOK

3rd Edition.

8 Oct 1900.

ON THE

LAW OF TORTS

BY

WILLIAM B. HALE, LL. B.

Author of "Bailments and Carriers," "Damages," Etc.

ST. PAUL, MINN.
WEST PUBLISHING CO.

1896

COPYRIGHT, 1898,
BY
WEST PUBLISHING COMPANY.

231844

YASAR, G. and K. K. KAYA. 1991. The effects of temperature and salinity on the growth and survival of the common carp (*Cyprinus carpio* L.). *Journal of the Turkish Ministry of Agriculture* 17:1-10.

PREFACE.

The present work is brought out to supply the demand for a single volume work on Torts, along the lines laid down in Mr. Jaggard's two-volume treatise, published a year ago. It is practically an abridgment of the larger work.

The general plan of the original has been closely followed, but a number of changes have been made in the internal arrangement of several chapters, and in the black-letter paragraphs throughout, the object being to simplify the treatment of the subject whenever possible. The discussion of Legal Rights and Wrongs, in chapter I., and of Damages, in chapter V., differ considerably from Mr. Jaggard's discussion of the same subjects. The only other considerable changes in text that have been made occur in the chapter treating of a Master's Liability to Third Persons, and in the chapter on Negligence. In both chapters Mr. Jaggard's ideas have been substantially preserved, but the arrangement and expression of them are largely the editor's own.

It is believed that nothing of value in the original text has been omitted. The abridgment has been principally effected by the omission of merely cumulative citations and illustrations from text and notes. But the citation of authorities has not been confined to those of the original work. Many additional cases which may fairly be called leading or illustrative have been added.

September 15, 1898.

W. B. H.

TABLE OF CONTENTS. ,

Part I.

GENERAL PRINCIPLES.

CHAPTER I.

GENERAL NATURE OF TORTS.

Section	Page
1. Definition	2-5
2. The Adjective and Substantive Law of Torts.....	5
3. Adjective Law of Torts.....	5
4. Torts and Crimes Distinguished.....	5-8
5. In What Courts Torts are Cognizable.....	9-11
6-8. Administration of the Law of Torts by Courts of Com- mon Law	11-22
9. Substantive Law of Torts.....	22
10. The Person Injured.....	22-24
11. The Tort Feasor.....	24-25
12. The Wrongful Conduct.....	26-27
13. Why Liability Attaches.....	28-35
14-17. How Liability Attaches.....	35-43
18-19. Connection as Cause.....	43-49
20-23. Legal Rights and Wrongs.....	50-65
24. General Summary	66-67

CHAPTER II.

VARIATIONS IN NORMAL RIGHT TO SUE.

25. Variations Based on Privilege of Actor.....	68
26. Public Acts—Acts of State.....	69-72
27-28. Conduct of Legislators.....	72-73
29-31. Conduct of Judicial Officers.....	73-78

Section		Page
32-35.	Conduct of Executive Officers.....	78-85
36.	Private Acts	86
37.	Exercise of Statutory Rights.....	86-88
38.	Exercise of Common Law Rights.....	89-92
39.	Variations Based on Status.....	93
40.	Insane Persons	93-95
41-43.	Infants	96-100
44.	Drunkards	100
45.	Convicts—Alien Enemies	101
46.	Private Corporations	101-104
47-48.	Municipal and Quasi Municipal Corporations.....	105-109
49.	Corporations, Not Municipal, Engaged in Public Work..	109-111
50.	Variations Based on Conduct of Plaintiff.....	111
51-52.	Wrongdoing by Plaintiff.....	111-116
53.	Consent	116-119

CHAPTER III.

LIABILITY FOR TORTS COMMITTED BY OR WITH OTHERS.

54.	In General	120
55.	Concert in Action—Joint Tort Feasors.....	120-123
56.	Liability of Joint Tort Feasors.....	123-124
57.	Contribution between Joint Tort Feasors.....	124-125
58.	Relationship	125
59-60.	Husband and Wife.....	125-129
61.	Landlord and Tenant.....	130-132
62-63.	Independent Contractor	133-138
64.	Master and Servant.....	138
65.	Master's Liability to Third Persons.....	138-139
66.	Existence of Relation.....	139-140
67.	Liability by Consent.....	141-142
68-69.	Liability Independent of Consent.....	143-154
	(a) The Servant's Conduct.....	143-149
	(b) The Master's Duty.....	149-154
70-71.	Reason of Liability.....	154-158
72.	Independent Torts	158-160
73.	Master's Liability to Servant.....	161
74.	Servant's Liability to Servant.....	161
75-78.	Liability of Servant to Master.....	162-164
79.	Liability of Servant to Third Person.....	164-167
80.	Partners	167-168

CHAPTER IV.**DISCHARGE AND LIMITATION OF LIABILITY FOR TORTS.**

Section	Page
81. In General	169
82. Discharge or Limitation by Voluntary Act of Party.....	169
83. By Waiver	170
84. By Agreement	171
85. Agreement before Damage.....	171-176
86. Agreement after Damage.....	176-180
87. Discharge or Limitation by Operation of Law.....	180
88. Discharge by Judgment.....	180-182
89-90. Discharge by Death.....	183-189
91-92. Statutes of Limitation.....	189-191
93. Compliance with Statutory Requirements.....	191-192
94-95. Discharge of Joint Torts—Judgment.....	192-194
96. Release	195
97. Waiver	195-198

CHAPTER V.**REMEDIES FOR TORTS—DAMAGES.**

98. In General	197
99. Extrajudicial Remedies	197
100. Judicial Remedies	198
101. Damages	199
102-104. Nominal Damages	199-205
105-116. Compensatory Damages	205-234
117. Exemplary Damages	234-237
118. Aggravation and Mitigation of Damages.....	237-238
119-120. Excessive and Inadequate Damages.....	238-242

Part II.
SPECIFIC WRONGS.

CHAPTER VI.

WRONGS AFFECTING FREEDOM AND SAFETY OF PERSON.

Section	Page
121. False Imprisonment—Definition	243-246
122. Who Liable	246-247
123-127. Defenses	247-252
128. Assault—Definition	252-254
129. Battery—Definition	254-255
130. Assault and Battery—Force and Intent.....	255-257
131. Defenses	257
132. Justification	257-261
133. Mitigation	261-262

CHAPTER VII.

INJURIES IN FAMILY RELATIONS.

134. The Family at Common Law.....	263
135. Master and Servant.....	264-265
136. Parent and Child.....	266-267
137-140. Actions for Injuries to Child.....	267-274
141. Husband and Wife.....	274-275
142-143. Action for Interference with Domestic Rights.....	275-278
144-145. Injuries to Wife—Double Cause of Action.....	278-280

CHAPTER VIII.

WRONGS AFFECTING REPUTATION.

146. Defamation Defined	281-282
147. Publication—Libel, Slander, and Malicious Prosecution Dis- tinguished	282-284
148. What Constitutes	284-286

TABLE OF CONTENTS.

ix

Section		Page
149.	Republication	286-287
150.	Application to the Plaintiff.....	287-289
151.	Damage as the Gist of Libel and Slander.....	289
152-153.	Presumption in Action for Slander.....	290-292
154-155.	Presumption in Action for Libel.....	293-295
156.	Construction of Language Used.....	296-297
157.	Signification of Words.....	297-303
158.	Malice	303-307
159.	Defenses	307-308
160.	Common-Law Defenses	308
161-163.	Justification	308-319
164.	Mitigation	320-323
165.	Slander of Title or Property.....	323-326

CHAPTER IX.

MALICIOUS WRONGS.

166.	Malicious Wrongs in General.....	327-328
167.	Deceit	328
168.	The Wrongful Conduct of Defendant.....	328-329
169.	The Fraudulent Intent.....	329-332
170-173.	The False Representation.....	333-342
174-175.	Conduct of Plaintiff.....	342-347
176.	Resulting Damage	347-348
177-178.	Malicious Prosecution	349
179.	The Judicial Proceeding.....	349-352
180.	Termination of Proceeding.....	352-353
181.	Parties to Proceeding.....	354
182.	Malice and Want of Probable Cause.....	354-358
183.	Damages	359
184.	Distinction from False Imprisonment.....	359-360
185.	Malicious Abuse of Process.....	361-362
186.	Malicious Interference with Contract.....	362-364
187-188.	Conspiracy	364-366
189.	Strikes and Boycotts.....	366-377

CHAPTER X.

WRONGS TO POSSESSION AND PROPERTY.

190.	Duty to Respect Property and Possession—Remedies.....	378-381
191.	Nature of Possession.....	381
192.	Trespass—Definition	382-383

Section		Page
196-196.	Possession to Maintain.....	384-388
196.	Defenses	388-396
197.	Remedies	396-397
198.	Waste—Definition	397
199-202.	Kinds of Waste.....	398-402
203.	Remedies	402-403
204.	Conversion—Definition	403-404
205.	Title to Maintain.....	404-406
206-209.	The Unauthorized Act.....	406-413
210.	Parties	413-416
211.	Remedies	416-418

CHAPTER XI.

NUISANCE.

212.	Definition	419-420
213.	Rights Invaded	421-429
214.	The Annoyance or Interference.....	429-431
215.	Care and Motive.....	431-432
216.	Coming to Nuisance.....	432-433
217.	Locality of Nuisance.....	433-434
218.	Damages as the Gist.....	434-435
219.	Kinds of Nuisances.....	436
220.	Public, Private, and Mixed Nuisances.....	436-438
221.	Continuing Nuisance.....	438
222.	Legalized Nuisance	439-442
223-224.	Parties to Proceedings against.....	442-444
225.	Remedies	444-448

CHAPTER XII.

NEGLIGENCE.

226-228.	Definition—Essential Elements	449-452.
229.	Degrees of Negligence.....	452-454
230.	Duty to Exercise Care.....	454
231.	Common-Law Duty	454-467
232-233.	Contract Duty	468-475
234.	Statutory Duty	475-480
235.	Violation of Duty.....	480-481
236-237.	Burden of Proof.....	482-485
238.	Evidence	486-487
239.	Damages	487-488

TABLE OF CONTENTS.

xi

Section	Page
240. Contributory Negligence	488-489
241-245. Elements of Contributory Negligence.....	489-495
246. Comparative Negligence	496
247-249. Vicarious Negligence	497-503

CHAPTER XIII.

MASTER AND SERVANT.

250. Master's Duties to Servant.....	504-511
251. Master not an Insurer.....	511-512
252-253. Assumption of Risk by Servant.....	513
254. Ordinary Risks	513-515
255. Extraordinary Risks	515-516
256. Exceptions	516-520
257. Risk of Fellow Servants.....	520-522
258. Common Employment	522
259-260. Vice Principals	523-528
261-262. Concurrent Negligence of Master.....	528-530
263. Statutory Changes	530-531

HALE'S HANDBOOK OF THE LAW OF TORTS.

Part I. GENERAL PRINCIPLES.

CHAPTER I.

GENERAL NATURE OF TORTS.

1. Definition.
2. The Adjective and Substantive Law of Torts.
3. Adjective Law of Torts.
4. Torts and Crimes Distinguished.
5. In What Courts Torts are Cognizable.
- 6-8. Administration of the Law of Torts by Courts of Common Law.
9. Substantive Law of Torts.
10. The Person Injured.
11. The Tort Feasor.
12. The Wrongful Conduct.
13. Why Liability Attaches.
- 14-17. How Liability Attaches.
- 18-19. Connection as Cause.
- 20-23. Legal Rights and Wrongs.
24. General Summary.

DEFINITION.

1. A tort is an act or omission giving rise, by virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action on a contract.¹

Derivation.

The French word "tort" is derived from the Latin "torquere," to twist; "tortus," twisted or wrested aside. It is what is crooked, as distinguished from what is straight. It is the opposite of right (droit).²

Definition by Reference to Remedy.

Many attempts have been made with varying success to define a "tort." The above definition of Mr. Pollock, while a negative one, seems to be least unsuccessful and unsatisfactory. It is founded upon a favorite and important distinction on which jurists lay great stress, but with respect to which there is considerable difference in terminology. It is evident that there are two main ideas set forth by this definition: the conduct which constitutes a tort and the redress which the law provides for the wrong done,—the cause of action and the remedy. Accordingly, the definition may be considered as involving (a) a portion of the general law, which defines

¹ Pol. Torts, *4. Similarly, Mr. Bishop, in Noncontract Law, defines a tort to be "one's disturbance of another in rights which the law has created, either in absence of contract or in consequence of a relation which a contract had established between the parties." Bish. Noncont. Law, § 4. This definition is not, however, so broad or so accurate as is Mr. Pollock's. "For the purposes of one first approaching the subject, the term 'tort' cannot be defined in language not itself needing definition. Indeed, no definition, helped out even by explanation, can convey a full conception of the meaning of such an expression as 'the law of torts;' nothing short of careful study of the specific torts of the law will suffice. The difficulty grows out of the fact that there is no such thing as a typical example, an actual tort, that is to say, which contains all the elements entering into every other. One is as perfect as another; and each of the torts of the law differs, not merely in point of fact from the rest, but in its legal constituents as well." Bigelow, Torts, preface.

² Black, Law Dict. tit. "Tort"; Bouv. Law Dict. tit. "Tort"; Jac. Law Dict. tit. "Tort"; Co. Litt. 158b; Whyte v. Rysden, Cro. Car. 20; Pol. Torts, *2.

the rights and commands the corresponding duties controlling the relations of individuals to each other,—that is to say, a portion of the law substantive; and as involving, also, (b) a portion of the general law, which provides the means by which these rights and duties are enforced and a violation of them is prevented or redressed,—that is to say, a portion of the law adjective.³ When a right exists, there must be a corresponding duty to observe that right; and a tort or a wrong may be spoken of either as a breach or violation of a duty or an infringement of a right.⁴ The law substantive, or the law of rights and duties, is concerned with acts or omissions complained of as a breach, or as a violation of a duty or infringement of a right. The law adjective, or the law of procedure and remedies, deals with tribunals, the forms of actions, and other means of prevention or redress.

³ Mr. Bentham and the German writers adopted the division of the law into law substantive and law adjective, or instrumental law. This arrangement Mr. Austin regards as involving a double logical error—First, because much of the substantive law as thus understood is the adjective or instrumental; second, because, if the law of procedure is called “*droit adjectif*,” that term ought to be extended to the law relating to rights and duties arising from civil injury and from crimes or punishment. He proposes as a substitute primary or principle, as distinguished from secondary or sanctioning, duties. 2 Aust. Jur. lect. 45, §§ 1031–1034, lect. 46, § 1041; and see 8 Harv. Law Rev. 187–196; Pom. Rem. & Rem. Rights, c. 1. The terms “law adjective” and “law substantive” will be used in this book with considerable latitude of meaning. According to perhaps what is the most recent contribution to the subject, rights are antecedent and remedial. Antecedent rights are: (1) Rights in rem; and (2) in personam. Rights in rem are rights available against all the world,—as the proprietary right of an owner of a house or land. Rights in personam are rights availing against a definite individual,—as a right of a landlord to his rent. Antecedent rights are those which exist independently of any wrong having been committed, as in the above examples. The persons clothed with them are in enjoyment of advantages not possessed by the rest of the community. A remedial right is one given by way of compensation when an antecedent right is violated. Remedial rights are also in rem and in personam (the latter being by far the most common). Proceedings to obtain a divorce, or against a ship in the admiralty division, are illustrations of the former, while proceedings against individuals who infringe antecedent rights are illustrations of the latter; and these are the subject of torts. Holl. Jur. 141; Shearw. Torts, 1, 2.

⁴ Whart. Neg. § 24; Emry v. Roanoke, etc., Co., 111 N. C. 94, 16 S. E. 18. Austin’s definition of a right is that “a party has a right when another or

Other Definitions.

It is quite common to define a tort by ringing changes on the fallacious infelicity: "A tort is a wrong independent of a contract."⁵ To so define a tort is to ignore the fact that there are other noncontractual wrongs. A breach of trust, adultery, or the refusal to pay just compensation for a relief to a vessel in distress, are wrongs; but none of them are torts, although they are all noncontractual wrongs.⁶ And, on the other hand, while rights involve, in the law of torts, a distinction from those arising out of contract, there is also a distinction from a vast array of other rights,—as right of trial by jury, the right to file a mechanic's lien, or to foreclose a mortgage, or the rights acquired by adverse possession. This definition is as defective as would be the definition of the horse as belonging to a class of animals independent of the horned animals.⁷ Moreover, a class of torts conveniently called quasi torts arise out of a state of facts of which a contract is an essential part. Indeed there is good authority for saying that when a contract is broken an action on the contract or an action on the tort for the breach of the duty imposed by the contract may be brought.⁸

The famous saying of Bagley, J., in *Rex v. Commissioners of Sewers of Pagham*,⁹ is frequently converted into a definition: "If a man sustains damages by the wrongful act of another, he is entitled to a remedy; but to give him that title two things must concur,—damage to himself and wrong by another." This definition is fairly subject to criticism. "That an action in case will lie when there is concurrence of actual damage to plaintiff and wrongful act by defendant is a truism, yet, unexplained, misleading."¹⁰ Perhaps the

others are bound or obliged by the law to do or forbear towards, or in regard of, him." 1 Jur. lect. 16, p. 277, sub. 576.

⁵ Clerk & L. Torts, 1 (with this addition: "For which the appropriate remedy is a common-law action").

⁶ Pol. Torts, p. 3.

⁷ Innes, Torts, § 6.

⁸ Broom, Comm. (5th Ed.) 660; Ball, Torts, 4; *Boorman v. Brown*, 3 Q. B. 511-526; *Rich v. New York Cent. R. Co.*, 87 N. Y. 382 (collecting and commenting on definitions).

⁹ *Rex v. Commissioners of Sewers of Pagham*, 8 Barn. & C. 355-362.

¹⁰ *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57. A very simple, but in

most vital objection to this definition is that it leads to merely verbal reasoning on the words "damage" and "wrong."

THE ADJECTIVE AND SUBSTANTIVE LAW OF TORTS.

2. The definition of a tort may be conveniently considered as involving a portion of—

- (a) The law adjective and**
- (b) The law substantive.**

ADJECTIVE LAW OF TORTS.

3. Under the law adjective will be considered the place the law of torts holds with respect to other matters of judicial cognizance; specifically:

- (a) Torts as distinguished from crimes;**
- (b) That the law of torts is administered by courts of common law only; and**
- (c) The administration of the law of torts by the courts of common law.**

SAME—TORTS AND CRIMES DISTINGUISHED.

4. The law of torts is the common border land of civil and criminal and of public and private law. The same conduct may be both a tort and a criminal wrong, but a criminal wrong is not necessarily a tort, nor is a tort necessarily a criminal wrong. A tort differs from a crime

- (a) As to the mental attitude of the wrongdoer,**
- (b) As to the consequences of the wrong, and**
- (c) As to redress or remedy.**

Torts and Crimes not Convertible.

The same state of facts may constitute either a tort or a crime. Indeed most crimes may also be regarded as torts. Thus, one common respects admirable, definition suggested is: "A tort is a breach of duty fixed by municipal law, for which a suit for damages may be maintained." It will subsequently be seen that the duties for the violation of which an action in tort can be maintained against a common carrier or a master are really fixed by municipal law, although they may be also incorporated in a contract.

mitting an assault with an intent to kill commits a crime for which he may be arrested, and does damage which may be recovered by the person assaulted in a civil action.

Until the time of Bracton (A. D. 1250) personal injuries were not the subject of civil action.¹¹ Even after that period, these subjects were treated under the head of criminal law, and the defendant in such cases, when sued by civil process, was compelled not only to compensate the plaintiff but also to pay an attendant fine to the king.¹² A trace of this quasi criminal nature of a tort is left in the allowance to the injured person of punitive or exemplary damages where the wrong is willful or malicious; because malice is the *mens rea* which is an indispensable ingredient of a crime.

A criminal wrong is not always a tort. Thus, treason cannot be called a tort. Nor does the violation of a public duty always create a right of action in a private citizen damaged thereby.¹³ A public nuisance is a criminal wrong. It may or may not be also a private wrong or tort. It is not a private wrong unless the complaining party has suffered some special hurt apart from the injury done the whole community.¹⁴ Many torts, like simple negligence, malicious interference with rights, and accidental trespasses, cannot be regarded as criminal wrongs.¹⁵ Even nuisance may be a civil and not a criminal wrong.¹⁶ "Accountability for civil injuries is even greater than for criminal acts."¹⁷

¹¹ 1 Spence, 121.

¹² Pol. Torts, § 3; Innes, Torts, § 33; Finch, Com. Law (1654; Ed. 1759) 198. Civil redress was often given in criminal actions. For example, the early writ of deceit in the register ran: "The King to the Sheriff of L., greeting: If A. shall make you secure, etc., P. & C. as well to answer us as well as the aforesaid A., wherefore he, etc." Fitzh. Nat. Brev. 96a, 97b. So, in appeal of robbery, restitution of the goods taken, as well as punishment for the felony, was awarded.

¹³ Ward v. Hobbs, 4 App. Cas. 13.

¹⁴ Wilkes v. Market Co., 2 Bing. N. C. 281; Long v. Minneapolis (Minn.) 63 N. W. 174; Henly v. Mayor, etc., 5 Bing. 91; Proprietors, etc., of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276; Barnes v. Racine, 4 Wis. 454; post, p. 436.

¹⁵ Contributory negligence in carelessly exposing property is no defense to proceeding for its theft. Clark, Cr. Law, 260.

¹⁶ Com. v. Webb, 6 Rand. (Va.) 726.

¹⁷ Agnew, J., in McGrew v. Stone, 53 Pa. St. 436-444.

Mental Attitude of Wrongdoer.

Intention is the essence of criminal liability. In some classes of cases of the law of torts this is also true, but in others, and perhaps ordinarily, the law of torts does not depend upon intention, or the mental attitude of the wrongdoer. In consequence, many persons incapable of committing a crime because of mental incapacity are held liable for torts. The difference which the element of intention involves in the law of crimes and torts is well illustrated in the case where one man points a pistol which he knows is not loaded at another. In such a case he cannot be arrested for criminal assault, because of absence of any possible intention to commit an assault.¹⁸ The person at whom the pistol was pointed, even if he did not know it was loaded, may recover in tort.¹⁹ Intent to inflict bodily harm is not necessarily of the essence of assault and battery regarded as a tort.²⁰ The injury such persons suffer is the same. So, if one man sells the property of another under the honest but mistaken belief that he has title to it, he cannot be convicted of larceny.²¹ But he would be liable to the true owner of the property in an action on the tort, called conversion.²²

Consequences of Wrong.

A crime is an injury to the whole community,—the state suffers. A tort is an injury to a private person,—the individual suffers. A crime is always a violation of a public law, and a tort is often a violation of a private law, and sometimes also of public law. In consequence, while a tort may be settled by the sufferer, a crime not

¹⁸ *Chapman v. State*, 78 Ala. 463, Chase, Lead. Cas. 70; *State v. Sears*, 86 Mo. 169; *McKay v. State*, 44 Tex. 43; *State v. Godfrey*, 17 Or. 300, 20 Pac. 625. But see *People v. Lilley*, 43 Mich. 521, 5 N. W. 982; *People v. Ryan*, 55 Hun, 214, 8 N. Y. Supp. 241. There would seem to be no sound basis for this distinction. Ames, Cas. 11, note. See *Com. v. White*, 110 Mass. 407; *State v. Shepard*, 10 Iowa, 126; *State v. Smith*, 2 Humph. 457.

¹⁹ *Beach v. Hancock*, 27 N. H. 223.

²⁰ Post, p. 252, "Assault and Battery."

²¹ *Desty*, Am. Cr. Law, § 145j. And see *Reeves v. State*, 95 Ala. 31, 11 South. 158-168; *U. S. v. Harper*, 33 Fed. 471.

²² *Hollins v. Fowler*, L. R. 7 H. L. 757.

only cannot be condoned,²³ but shielding an offender may be an offense.²⁴

Remedy.

Redress for a crime is punishment by the state; the remedy for a tort is ordinarily compensation, and in some cases punitive damages, to the person injured. The law of crimes is administered by criminal courts with appropriate procedure; the law of torts is administered by civil courts under different practice.

The English law contained an anomaly called "trespass merged in felony." Its principle was that the private right of action was suspended until the public prosecution was completed, whenever the tort amounted to a felony. Until 1870 conviction of a felony forfeited the estate of the felon to the crown. There could accordingly be no effective remedy after conviction. In many cases the right of the individual would have been "merged in the felony." There is good ground for believing that this rule would not now be sustained by English courts.

In the United States the civil and criminal proceedings have been kept separate. Both may be begun at the same time, or either may precede or succeed the other. Neither acquittal nor conviction of a criminal charge bars a civil action. In some states, however, it required statutory enactment to abrogate the English rule.²⁵

²³ Clark, Cr. Law, 7; *Fleener v. State*, 58 Ark. 98, 23 S. W. 1 (embezzlement); *State v. Tall*, 43 Minn. 273, 45 N. W. 449 (forgery); *Com. v. Slattery*, 147 Mass. 423, 18 N. E. 399 (ravishment).

²⁴ Clark, Cr. Law, 329.

²⁵ *Wells v. Abrahams*, L. R. 7 Q. B. 554; *Ex parte Ball*, 10 Ch. Div. 667-671; *Roopo v. D'Avigdor*, 10 Q. B. Div. 412; *Lutterell v. Reynell*, 1 Mod. 282; *Phillips v. Eyre*, L. R. 6 Q. B. 1. And see article in 98 Law T. 227; *Williams v. Dickenson*, 28 Fla. 90-97, 9 South. 847; *Boston & W. R. Corp. v. Dana*, 1 Gray, 83-96; *Pettingill v. Rideout*, 6 N. H. 454; *People v. Walsen*, 17 Colo. 170, 28 Pac. 1119; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Howk v. Minnick*, 19 Ohio St. 462; *Newell v. Cowan*, 30 Miss. 492.

SAME—IN WHAT COURTS TORTS ARE COGNIZABLE.

5. A tort is cognizable in courts of common law only, and not in

- (a) Divorce courts;**
- (b) Ecclesiastical or probate courts;**
- (c) Courts of admiralty;**
- (d) Courts of equity.**

This, strictly speaking, may be an artificial restriction of the natural and legitimate meaning of the term "tort." There certainly are legal wrongs essentially identical with the substantive elements of a tort recognized by courts which are not courts of common law. For the sake of convenience, however, whenever the term "tort" is used in this book it is treated as referring to the common law of torts only. It is to be noted, moreover, that the best English authorities (and they are entitled to special weight, because of the distinct separation of English courts) would sustain the text in limiting a tort to courts of common law.

Torts not Recognized in Divorce, Ecclesiastical or Probate Courts.

Torts are not cognizable in divorce courts²⁷ nor in ecclesiastical or probate courts. English ecclesiastical courts have never been recognized in America.²⁸ A number of matters within the jurisdiction of those courts in England have been transferred to courts of common law in this country. Thus the common law, in its early stages, refused to recognize the idea of property in a corpse, and treated it as belonging to no one except the church. In the United States the right to possession of a dead body, for the purposes of preservation and interment, in the absence of testamentary disposition of it, belongs to the family of the deceased; and any infraction of this right, as by mutilation, will entitle to the recovery

²⁷ Clerk & L. Torts (1889) 1. In some states this action still lies in the courts of common law.

²⁸ Youngs v. Ransom, 31 Barb. 49. And generally, see Smith, Ecc. Law. As to ecclesiastical law in England at the present time, see Boyer v. Bishop of Norwich [1892] App. Cas. 417; Read v. Bishop of Lincoln, Id. 644.

of damages by an action on tort in a court of common law.²⁹ In early days there was an offense termed "defamation," as the publication of blasphemous words,³⁰ for which the ecclesiastical court provided a remedy. The jurisdiction of ecclesiastical courts over crimes like incest led to cognizance of certain malicious prosecutions.³¹ In America, all civil proceedings for defamation and malicious prosecution are brought in courts of common law.

"While, in the process of gradual development, most American probate courts have been invested with much larger powers than the early English testamentary courts, yet in none of them have there ever been vested any such extensive powers. Ordinarily the functions of such courts have been limited to the control of the devolution of property upon the death of the owner, and have not been extended to collateral matters involving controversies between the estate and third parties. These, if an adjudication of them becomes necessary, have generally been left to be tried in the appropriate action in the courts of general jurisdiction." Accordingly, where the claim arises on tort, the claimant may bring his action against the personal representative in the district or other court of competent original jurisdiction, but not in the probate court.³²

Torts not Recognized by Courts of Admiralty.

Courts of admiralty have jurisdiction over the whole subject of damages on the high seas. Maritime torts are of the same nature as common-law torts, with the element of locality added, and the consequent jurisdiction of the courts of admiralty.³³ The law as to maritime torts, however, is not always the same as the law relat-

²⁹ *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238; but see *Cook v. Walley*, 1 Colo. App. 163, 27 Pac. 950. Further, as to law of dead bodies, see *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42; *Wynkoop v. Wynkoop*, 42 Pa. St. 293; *Reniham v. Wright*, 125 Ind. 536, 25 N. E. 822; *Snyder v. Snyder*, 60 How. Prac. 368.

³⁰ *Odger, Sland. & L.* 350-352.

³¹ *Fisher v. Bristow*, 1 Doug. 215.

³² *Mitchell, J., in Comstock v. Matthews*, 55 Minn. 111, 56 N. W. 583.

³³ *In re Fassett*, 142 U. S. 479, 12 Sup. Ct. 295; *Ben. Adm. (2d Ed.)*; *Philadelphia, W. & B. Ry. Co. v. Philadelphia & H. de G. Steam Towboat Co.*, 23 How. 209; *Greenwood v. Town of Westport*, 53 Fed. 824. An injury to a vessel from negligence in operating a draw in a drawbridge is a maritime tort, and a court of admiralty will entertain an action therefor. *Greenwood*

ing to common-law torts.³⁴ This should be carefully borne in mind, in dealing with admiralty cases as authorities for propositions as to ordinary torts.

Wherever the common law is competent to give it, a suitor does not lose his right to use a common-law remedy because a tort is committed on the high seas, or other waters subject to the admiralty jurisdiction. Thus common-law remedies apply to a collision on the Ohio river. Ohio courts can administer it. It is not necessary to go into the courts of admiralty.³⁵

Torts not Recognized in Courts of Equity.

Courts of equity afford redress in cases where the common law affords no remedy, or an inadequate one. The normal remedy for a tort—compensation—is administered by the court of common law, not by a court of equity. When that remedy is sufficient, equity will not interfere. But there are cases where equity's peculiar remedies are necessary to do justice, and in these equitable interference is always granted.³⁶ In other words, the jurisdiction of equity may be concurrent.

SAME — ADMINISTRATION OF THE LAW OF TORTS BY COURTS OF COMMON LAW.

6. There were two forms of personal action at common law:

- (a) **Actions ex contractu and**
- (b) **Actions ex delicto.**

7. Through these two classes of personal actions, the common law administered four kinds of obligations or provided remedies for four kinds of recognized substantive rights, viz.:

v. *Town of Westport*, 60 Fed. 560. The wrongful arrest on shore of deserting seamen, by the procurement of the master, does not constitute a maritime tort. *Bain v. Sandusky Transp. Co.*, 60 Fed. 912.

³⁴ As in cases of collision, post, p. 496, note 276, "Comparative Negligence."

³⁵ *Schoonmaker v. Gilmore*, 102 U. S. 118; *McDonald v. Mallory*, 77 N. Y. 546-556; *Percival v. Hickey*, 18 Johns. 257.

³⁶ Post, p. 198, "Remedies." As to the application of the equitable doctrine of subrogation to conversion, see *Tobin v. Kirk*, 73 Hun, 229, 25 N. Y. Supp. 931.

- (a) Contracts pure and simple;
- (b) Quasi contracts;
- (c) Torts pure and simple;
- (d) Quasi torts.

8. The common law observed no distinct or strictly logical rule with respect to the administration of these four kinds of obligations by means of the two forms of personal action. It sometimes allowed the enforcement of a tort or a quasi tort through an action *ex contractu* and of a contract and quasi contract through an action *ex delicto*.

Forms of Actions.

Actions at common law were commenced, in its early day, by the issuance of an original writ. The ancient forms of writs were kept in the *registrum brevium*.³⁷ There were three prescribed forms of actions which it recognized, distinguished by subject-matter,—as real, personal, and mixed. Real actions were for the specific recovery of real property only. For a long time they have been extinct. Mixed actions were for the specific recovery of real property, and for damages for an injury thereto,—as ejectment. Personal actions were for the recovery of a debt, or a specific personal chattel, or of damages for a breach of contract, or of satisfaction in damages for some injury to the person or to real or personal property. Personal actions were, in form, *ex contractu* or *ex delicto*.³⁸

Among the earliest actions *ex delicto* was the action of trespass. This lay for the recovery of damage for injury to the person, property, or relative rights of another; but only where such injuries

³⁷ The common-law writs were always written (2 Reeves, Hist. 266); were settled verbatim by the time of Edward III.; were printed in the register in the reign of Henry VIII. (4 Reeves, Hist. 429); and were declared fixed and immutable, unless changed by authority of parliament (Bracton, *de ex. lib.* 5, c. 17, § 2). According to Lord Coke, the register antedates the Conquest (A. D. 1066). Pref. 10 Rep. p. xxiv.; 4 Inst. 140; Dugd. Orig. p. 56. Mr. Bigelow, as to this statement (Lead. Cas. 16), cites as authority for its improbability, Hicke's *Thesaurus Dissertatio Epist.* p. S.

³⁸ Chit. Pl. 110; Ship. Com. Law Pl. 2.

have been committed with force, actual or implied.³⁹ It lay only where there was a direct, immediate invasion of another's right. When the wrong was with force to the person, as in assault and battery or false imprisonment, it was trespass *vi et armis*.⁴⁰ When it consisted in unlawfully breaking a man's close, it was trespass *quare clausum fregit*.⁴¹ When it was committed by carrying away his chattels, it was trespass *de bonis asportatis*.⁴²

However, as new causes of action arose, no matter how great was his wrong, the individual, if he could find in the register of writs no writ to fit his case, had no remedy. To supply this deficiency in the law adjective, the celebrated statute of Westm. II. (13 Edw. I.) was enacted. This provided that as often as it should happen that in one case a writ was found, and in a like case (*in consimili casu*) falling under the same right, and requiring like remedy, no writ was to be found, the clerks should agree in making a writ, or adjourn the complaint until, and refer the matter to, the next parliament. Under this statute new writs were copiously produced.⁴³ Out of it arose the celebrated actions on the case, viz. action of *assumpsit*, which became in time an action *ex contractu*, although it retained traces of the *ex delicto* character of its origin; the action of *detinue*, which is sometimes regarded as *ex contractu*, and sometimes as *ex delicto*, and sometimes as neither;⁴⁴ the action of conversion; and (the almost distinctive action *ex delicto*)⁴⁵ trespass on the case.

³⁹ Ship. Com. Law Pl. 72. Laws as to trespass not fully settled until time of Edward I., although mentioned by Bracton. 2 Reeves, Hist. 149.

⁴⁰ Id. Trespass *vi et armis* lay for negligence. *Percival v. Hickey*, 18 Johns. 257.

⁴¹ Ship. Com. Law Pl. 74. Generally, as to forms of trespass, see 3 Bl. Comm. 120, 151. And see 1 Chit. Pl. 192, 193.

⁴² Id. 73.

⁴³ 3 Bl. Comm. 49; Steph. Pl. 6. A good illustration is the *per quod* action by a husband or parent for an injury to or seduction of his wife or child. Prior to the statute of laborers (23 Edw. III. 1349), the husband or parent could maintain no action for such a wrong. That statute gave an action to the master for an injury to his servant "*per quod servitium amisit*." This was easily adapted so as to be used by a father for the seduction of his child, and by a husband for abuse by a stranger of his wife, "*per quod consortium amisit*."

⁴⁴ Pol. Torts; Gilb. 6; Steph. Pl. 18b; *Peabody v. Hayt*, 10 Mass. 35.

⁴⁵ *Mills v. U. S.*, 48 Fed. 738; 1 Chit. 99; *Browne, Action*, 318, note f.

This action (trespass on the case) lay, not for direct or immediate invasion of another's right, but for conduct in which the wrong consisted in consequential damage.⁴⁶ In trespass, the liability was absolute. In case, the liability was dependent on harmful results. Case lay for injury to absolute rights, not involving force, and where the damages were consequential, as for keeping dangerous animals.⁴⁷ It lay also for invasion of relative rights, as seduction, or alienation of affection.⁴⁸ It lay also especially for the large class of cases known now by the vague name of "negligence."⁴⁹ When trespass lay, and when case, was, at common law, an important question of pleading, because, if the pleader mistook his remedy, he would be dismissed from court.⁵⁰ Since the abolition of forms of action,

⁴⁶ *Cooper v. Landon*, 102 Mass. 58; *Ship. Com. Law Pl.* 45, and cases there cited.

⁴⁷ *Sarch v. Blackburn*, 4 Car. & P. 297; *Stumps v. Kelley*, 22 Ill. 140. And see, generally, *Cooper v. Landon*, 102 Mass. 58; *Singer v. Bender*, 64 Wis. 172, 24 N. W. 903; *Henry v. Railroad Co.*, 139 Pa. St. 289, 21 Atl. 157.

⁴⁸ *Clough v. Tenney*, 5 Me. 446; *Hornketh v. Barr*, 8 Serg. & R. 35.

⁴⁹ *Coggs v. Bernard*, *Smith, Lead. Cas.*, 2 Ld. Raym. 909; *Samuel v. Judin*, 6 East, 333; *Dearborn v. Dearborn*, 15 Mass. 315; *Church v. Mumford*, 11 Johns. 479; *Hamilton v. Plainwell Water-Power Co.*, 81 Mich. 21, 45 N. W. 648. As to the distinctions as to force and immediate and direct or immediate and consequential injuries, see 1 Chit. Pl. (16th Am. Ed.) 140, and cases cited; *Cotteral v. Cummins*, 6 Serg. & R. (Pa.) 341; *Winslow v. Beal*, 6 Call (Va.) 44; *Scott v. Shepherd*, 3 Wils. 403; *Beckwith v. Shordike*, 4 Burrows, 2093.

⁵⁰ The difference between trespass and case is well illustrated by *Espinasse*. "Trespass on the case is an action brought for the recovery of damages for acts unaccompanied with force, and which in their consequences only are injurious; for, though an act may be in itself lawful, yet if, in its effects or consequences, it is productive of any injury to another, it subjects the party to this action." 2 Esp. N. P. 597. [Cf. *Wakeman v. Robinson*, 1 Bing. 213.] Thus, where the defendant put up a spout on his own premises, this was an act lawful in itself; but when it produced an injury to the plaintiff by conveying the water into his yard, trespass on the case was adjudged to lie for such consequential injury. *Reynolds v. Clarke*, 1 Strange, 634. So shooting of a gun, which in itself is an indifferent and lawful act, yet when by it the plaintiff's decoy was injured this action was held to lie. *Keeble v. Hickeringill*, 11 Mod. 131. Again, where the plaintiff declared in case that the defendant furiously, negligently, and improperly drove his cart against the plaintiff's carriage, that it was overturned and broken, this was held ill on demurrer, and that the action should be trespass vi et armis. *Day v.*

the mere technical question of procedure has lost importance.⁵¹ But the deep-seated distinctions in the law substantive involved are as much legal battle grounds as ever.⁵²

Common-Law Obligations—Contract.

The common law administered obligations of contracts pure and simple. All true contracts grow out of the intention of the parties to the transaction, and are dictated only by their mutual and accordant wills. When this intention is expressed, the contract is expressed. When this intention is not expressed, but may be inferred, implied, or presumed from circumstances as really existing, then, and then only, is the contract thus ascertained properly called an "implied contract."⁵³ In all cases of contract the parties are determinate, and the rights in personam.

Same—Quasi Contract.

The obligation of a quasi or constructive contract was imposed by law in certain cases, without reference to the intention of the parties, and was administered through personal actions, *ex contractu*. Here the parties are determinate, but the right is not so clearly in personam. The substantive right was not contractual, but the common law, providing no strictly appropriate remedy, invented the fiction of an implied contract to strain an action *ex contractu* into use.⁵⁴ Thus a judgment for damages was called a "contract of rec-

Edwards, 5 Term R. 648. As to election between trespass and case, see *Blin v. Campbell*, 14 Johns. 432. Cf. *Percival v. Hickey*, 18 Johns. 257. And see *Wilson v. Smith*, 10 Wend. 324; *Seneca R. Co. v. Auburn & R. R. Co.*, 5 Hill, 170.

⁵¹ *New Orleans J. & G. N. R. Co. v. Hurst*, 36 Miss. 660; *Howe v. Cook*, 21 Wend. 29. And see *Ricker v. Freeman*, 50 N. H. 420.

⁵² The importance of the distinction from a theoretical standpoint is manifest in discussions of the ultimate basis of liability in tort. Practically it is of great moment in determining, for example, connection as cause (conspicuously in questions of damage), defense available (as of contributory negligence, independent contractor), the kind and extent of proof required of plaintiff (as the exercise of due care under the circumstances, or the breach of absolute duty). See *Holmes v. Mather*, L. R. 10 Exch. 261; *Johnson v. Philadelphia & R. R. Co.*, 163 Pa. St. 127, 29 Atl. 854.

⁵³ 2 Bl. Comm. 442; *Clark, Const.* 752; *Hertzog v. Hertzog*, 29 Pa. St. 465-467; *McIntyre Tp. v. Walsh*, 137 Pa. St. 302, 20 Atl. 706; *McSorley v. Faulkner* (Com. Pl. N. Y.) 18 N. Y. Supp. 400.

⁵⁴ *Clark, Const.* 753.

ord," to allow its revival by actions *ex contractu*.⁵⁵ Again, where one has unjustly enriched himself at the expense of another, as where he has been paid money by mistake, and without giving anything in return, there is clearly no agreement, expressed or implied, between the parties. It would, however, be manifest injustice not to make the one enriched by mistake disgorge. The common law, to supply the deficiency of its remedies, invented the fiction of implied promise on the part of him to whom the money was paid to repay.⁵⁶ Accordingly money paid under mistake could be recovered on an implied promise, by action *ex contractu*, called *indebitatus assumpsit*.⁵⁷ And finally a quasi contract may also be said to be founded upon statutory official or customary duty.⁵⁸

Same—Torts.

The common law administered also the obligation of torts, pure and simple. These consisted of violations of legal duty in no wise connected with contract.⁵⁹ Thus personal violence, assault and battery, interference with freedom of locomotion, false imprisonment, and trespass to land or goods are all actionable wrongs, and are committed, not only without any consent, but despite the will, of

⁵⁵ *Louisiana v. Mayor, etc., of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211.

⁵⁶ *Clark*, Cont. 764.

⁵⁷ *Merchants' Nat. Bank v. National Bank of the Commonwealth*, 139 Mass. 513, 2 N. E. 89; *Clark*, Cont. 771.

⁵⁸ *State T. I. Co. v. Harris*, 89 Ind. 363; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Mechem*, Pub. Off. 674, note 5; *Keener*, Quasi Cont. 16.

⁵⁹ A tort pure and simple is essentially different from a contract pure and simple. (a) The most substantial difference would seem to be that a tort pure and simple is independent of previous consent of the wrongdoer or of the injured one to bear the loss the tort may produce, whereas contract is always based on an agreement of minds. (b) The right involved in a tort of this kind is distinguished from that involved in such a contract in being in actual enjoyment at the time of the commission of a tort, while that of a contract is the right to the fulfillment of a promise made by some person. *Innes*, Torts, § 4. (c) The rule as to parties to an action on the contract and on the tort varies materially. Parties to a contract are determined by its terms. Contract rights are in personam. Parties to a tort are indeterminate. Rights *ex delicto* are in rem. Many persons may be liable for tort who cannot bind themselves by contract. Rights of contribution between defendants and judgment debtors are different in the two classes of actions; so, also, differs the effect of death of parties plaintiff or defendant, both at common law and

the person injured. Here the parties are indeterminate, and the rights in rem.

Same—Quasi Torts.

The obligation of a quasi tort may be strictly said to include all species of actionable civil wrongs not included in the preceding three classes. It is, however, convenient to apply it in a broader sense, so as to include also all cases in which an action *ex delicto* lies upon a state of facts of which a contract is a necessary part. It may arise from a violation of a right or duty which the law prescribes, and which to a limited extent individuals may modify with respect to certain conventional or contractual relations which are entered into by agreement, or from the violation of a different right or duty which the law recognizes as created by a range of facts of which a contract is a necessary part.

When a passenger takes a train, he ordinarily holds, as evidence of the contract he has made with the common carrier, a ticket and a baggage check. The shipper holds a bill of lading. Upon this simple state of facts the law bases a complex system of rights and duties as to person and property. Part of this the parties may have contemplated, but most of it exists in the common law alone, and derives its origin, not from real consent, but from ancient history, the legislation of the judges, and from statutes. Such rights and duties are not properly contractual, nor is their breach a contractual wrong; as, for example, where a passenger is assaulted by a servant of the common carrier, or injured by its negligence. In the case of master and servant, this is even more marked. The contract of employment, generally informal, incomplete, oral, and containing no more than an agreement of wages, work, and time of payment, en-

under the statutes of the various states. (d) Finally, the remedy in an action on a tort is the award of damages only. On the other hand, while damages may be awarded in an action *ex contractu*, a contract may also be reformed and specifically enforced. There is a material difference as to the measure of damage and the extent to which liability for consequences can be carried. Attention is called to the confusion likely to arise from attempts to distinguish a tort from a contract. It would seem that it conduces to distinguish between the four kinds of common-law obligations, rather than merely between contracts and torts.

tails liability and secures rights or superimposes duties implied⁶⁰ by law, with respect to the relation, unknown to the parties, and in large measure to lawyers, and, as to most material matters, in a number of instances, to the courts, prior to the decision of the case in issue. Thus it will be seen that the courts implied into the contract the doctrine of assumption of risk of the employment by the servant, and especially the risk of the negligence of a fellow servant. Nevertheless it is the contract, without which the relationship could not exist, which brings these rights into existence; and the rights and duties vary with the contracts. Thus a railroad company owes one set of duties to the person in its contract to carry a passenger, another to its employé, and a still different set of duties to a person with whom it has no contract. The same principle applies in a large measure to the reciprocal rights and duties of physician and patient, attorney and client, owner and architect or contractor, and in many other cases, as a telegraph company and the sender of a message, a vendor and vendee, a bank and a depositor, and the like. There is a body of law outside of the agreement of the parties prescribing rights and defining duties not directly contemplated by the parties, but a breach of which is actionable as a tort.

While thus the omission to perform a contract obligation is not a tort, unless that omission is also an omission of a legal duty, such legal duty may arise, not only out of certain conventional relations, but also out of a wider range of facts, of which a contract is an element, giving rise to a legal duty due from every man to his fellows, to respect the rights of property and person, and refrain from invading them by force or fraud or carelessness. This duty applies to both willful and negligent wrongs.⁶¹

In quasi torts it would seem that persons are sometimes determinate and sometimes indeterminate, and that the rights are sometimes in rem and sometimes in personam.

Common-Law Remedies.

The normal application of the two forms of personal actions to the four kinds of obligations would have been to administer wrongs

⁶⁰ Post, p. 504, "Negligence," "Master and Servant."

⁶¹ *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609; *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 382. See *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313.

based on contract and quasi contracts through actions *ex contractu*, and wrongs based on torts and quasi torts through actions *ex delicto*. In a large measure this was carried out, but there were many variations and a confusing inconsistency in the application of the forms of remedy to the obligation.

Same—Contract Sued ex Delicto.

Even certain actions which are really based on a contract and might be sued *ex contractu* may be brought in the form of an action *ex delicto* to evade either a statute or the ordinary provisions of law. Thus, the statute of frauds required guaranties to be in writing to avail. Instead of suing on a parol guaranty, therefore, actions were brought, in order to evade the statute, on the tort in deceit on allegation of false representations as to credit. The statute had no application to torts. By this means parol evidence was admitted, not to prove the guaranty, but the falseness of the representations. Such actions were so successful that Lord Tenterden's act was passed to make the statute of frauds cover, as to these points, both actions *ex contractu* and actions *ex delicto*.⁶² As will be seen, some persons, as infants and married women, were under a legal disability making them incapable of contracting, but a recovery could be had for their torts. Accordingly, a person, whenever he could, would sue *ex delicto* rather than *ex contractu*. Thus, if an infant should hire a horse and abuse it, it would be to the bailor's interest to sue on the tort, because he could not recover on the contract.⁶³

Same—Quasi Contract Sued ex Contractu or ex Delicto.

While the ordinary quasi contract is sued *ex contractu* on the fiction of a promise, an action *ex delicto* is sometimes brought for the breach of statutory duty. Thus, a sheriff may be liable for negligence with respect to his statutory duty. Indeed the common law freely recognized the right to sue for the negligent performance of a contract either *ex contractu* or *ex delicto*, whether there was

⁶² *Pasley v. Freeman*, 3 Term R. 51; *Lyde v. Barnard*, 1 Mees. & W. 101; *Tatton v. Wade*, 18 C. B. 371-381; *Wade v. Tatton*, 25 Law J. C. P. 240; *Rice v. Manley*, 66 N. Y. 82.

⁶³ Post, p. 98, "Infants."

actual ⁶⁴ damage or not.⁶⁵ And in general it would seem that, when a person has suffered injury from the neglect of duty which another has impliedly promised to perform, the action may be in tort or on contract, at the former's option, whether that duty be implied into a contract or arises from a statutory enactment.⁶⁶

Same—Torts Sued ex Contractu.

Perhaps the most singular anomaly in the application of the law adjective to the law substantive is to be found in the ruling of the common-law courts that an action on the contract will lie for a tort pure and simple. Thus, if a man steals goods of another, the latter may waive the tort and sue in assumpsit, although there is no contract.⁶⁷ It was not unnatural that certain cases which are in themselves ambiguous should have been regarded from a point of view both of tort and of contract as sustaining an action either ex contractu or ex delicto.⁶⁸ Thus, if goods have been sold, not by mistake but because of actionable fraud, the seller may sue in tort for damages because of deceit, or ex contractu in assumpsit for the value of the goods.⁶⁹

⁶⁴ An apothecary could be sued for breach of implied contract to use reasonable skill and care or for tortious negligence followed by actual damage. *Seare v. Prentice*, 8 East, 348; *Livingston v. Cox*, 6 Pa. St. 360.

⁶⁵ If a banker improperly dishonors a customer's check, the customer may bring suit in tort, although no actual damages have been sustained. *Marzetti v. Williams*, 1 Barn. & Adol. 415. So, if a bailee negligently damages goods intrusted to him, he may be sued in tort, although he commits a breach of the contract of bailment. *Hayn v. Culliford*, 4 C. P. Div. 182; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Boorman v. Brown*, 3 Q. B. 511. Or he may be sued in assumpsit. See *Zell v. Dunkle*, 156 Pa. St. 353, 27 Atl. 38; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 619.

⁶⁶ An action against a sheriff for damages for failure to permit plaintiff to obtain bail is in case. *Taylor v. Smith*, 104 Ala. 537, 16 South. 629; *Pittsburgh v. Grier*, 22 Pa. St. 54-65; *Lightly v. Clouston*, 1 Taunt. 112, per Mansfield, J.

⁶⁷ *Clark*, Cont. 766, 768; *Hill v. Davis*, 3 N. H. 384; *Gordon v. Bruner*, 49 Mo. 570; *Halleck v. Mixer*, 16 Cal. 574; *Hawk v. Thorn*, 54 Barb. 164.

⁶⁸ Right to waive a tort and sue in assumpsit is subject to the limitation that thereby defendant is not deprived of any benefit which he would have derived under the appropriate form of action on tort. 2 Greenl. Ev. § 120, citing *Lindon v. Hooper*, Cowp. 414-419; *Anscomb v. Shore*, 1 Camp. 285; *Young v. Marshall*, 8 Bing. 43; and many other cases.

⁶⁹ *Hill v. Perrott*, 3 Taunt. 274; *Steiner v. Clisby*, 103 Ala. 181, 15 South.

Same—Quasi Torts.

With respect to quasi torts the confusion is perhaps inextricable. It seems that there are two distinct classes of cases: (1) Where a contract has created a duty between the parties and privies, a breach of which is actionable under rules already considered, but in addition to this the contract has either repeated or put in force the common-law duty governing the relation or situation, a party or privy to the contract may sue *ex contractu* for breach of the contractual duty, or *ex delicto* for the breach of the common-law duty. Thus, by way of contrast, a stranger injured in a railroad accident can sue the company only *ex delicto*, while a passenger can sue either *ex contractu* or *ex delicto*.⁷⁰ If a contract should stipulate against liability for negligence in a jurisdiction where such a stipulation is enforced it might happen that the passenger in the case supposed could not recover, while a mere stranger might. (2) With respect to the right of third persons to recover in an action *ex delicto* for injury arising from a state of facts of which the breach of a contract is an essential part, three propositions may be made: (a) The mere contract creates no duty the violation of which gives rise to a cause of action on behalf of a stranger. (b) A contract limiting liability does not affect a stranger to the contract. (c) The contract excludes no liability, and does not prevent recovery by a stranger for the malicious, fraudulent, or negligent act of a party to the contract.⁷¹

Effect of Abolishing Forms of Action.

With the abolition of forms of action, artificial distinctions involved in the choice of remedies—the juggling with remedies—should disappear.⁷² Nevertheless the distinction retains great importance. While forms of action have been abolished in England, the question of costs in the superior court is still dependent on the accurate observance of the distinction.⁷³ In Massachusetts the ac-

612. And see Mr. Ames' History of Assumpsit in 2 Harv. Law Rev. 64; *Braithwaite v. Aiken* (N. D.) 56 N. W. 133.

⁷⁰ *Wilt v. Welsh*, 6 Watts, 9; *M'Call v. Forsyth*, 4 Watts & S. 179.

⁷¹ Post, p. 471.

⁷² Keener, *Quasi Cont.* 160; *Plg. Torts*, 7.

⁷³ *Pontifex v. Midland Ry. Co.*, 3 Q. B. Div. 23; *Bryant v. Herbert*, 3 Q. B. Div. 389; *Shaw v. Coffin*, 58 Me. 254.

tion on the tort is one of the three forms of civil action. In Pennsylvania, under the recent practice act, there is a similar modification of the common law.⁷⁴ In other states the old common-law forms of action are still in use. Even in Code states there has been comparatively little success achieved in the elimination of many of the common-law anomalies. This is due perhaps not so much to the conservatism of courts as to the natural and unavoidable connection between the law substantive and the law adjective.⁷⁵

SUBSTANTIVE LAW OF TORTS.

9. The law of rights, or substantive law of torts, will be considered with reference to—

- (a) The person injured;
- (b) The tortfeasor;
- (c) The wrongful conduct.

SAME—THE PERSON INJURED.

10. The law recognizes a normal right in every one against whom a tort is committed to secure legal redress therefor. But this right may be defeated by plaintiff's own conduct, as by his consent or his own wrong.

The Normal Right.

This is another way of putting the familiar maxim that wherever there is a wrong there is a remedy.⁷⁶ The remedy in tort lies ordinarily at the suit of the person injured. The action cannot

⁷⁴ See *Johnson v. Philadelphia & R. R. Co.*, 163 Pa. St. 127, 29 Atl. 854.

⁷⁵ In Minnesota, the importance of the distinction between actions ex contractu and ex delicto has been denied, with emphasis. *Serwe v. Northern Pac. R. Co.*, 48 Minn. 78, 50 N. W. 1021. But a demurrer to a complaint in an action against a physician for malpractice was there sustained because it appeared from the complaint that the defendant had a partner, who was not made a party defendant. *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632. If this action had been in tort, and the parties were tortfeasors, one or all could have been sued. If it was in contract, both should have been made parties.

⁷⁶ Post, p. 50.

generally be brought by one person to the use of another.⁷⁷ But personal disability may in certain cases necessitate bringing an action in tort in the name of some person other than the party injured. Thus, an infant, or a person absolutely insane, can sue only through a guardian or other person designated by law. This requirement as to the appointment of a guardian is part of the law adjective, and not of the law substantive. At common law the husband brought an action in his own name for a tort to his wife. Damages recovered were really part of her estate, although they actually went to him together with all her other property.⁷⁸ These apparent exceptions to the principle as stated, properly viewed, are really its adaptation to other branches of jurisprudence.

Consent.

No action can be maintained for damages arising from conduct to which the plaintiff consented, provided the conduct was not illegal,—that is, criminal. Consent cannot make an illegal action lawful. A person can only consent to the commission of lawful acts. His consent justifies only so far as it goes. A patient may lawfully consent to a surgical operation on him. This consent justifies the physician in performing the operation, but not in committing an assault. A prize fight is illegal, and, notwithstanding the consent of the parties in participating in it, one of them may sue the other for damages.

Plaintiff's consent operating as a bar to his recovery may be subsequent to the wrong complained of. Thus, if he has executed a release or accepted something in satisfaction of his claim for the wrong done, or has waived the tort, he cannot succeed in an action on the tort.

Wrong.

Again, the plaintiff cannot recover unless he himself be innocent. Thus, where plaintiff and defendant damaged a mill, for which plaintiff was forced to pay the whole, it was held that he could not recover contribution from defendant; for *ex turpi causa non oritur actio*.⁷⁹

⁷⁷ *Kansas City, M. & B. R. Co. v. Cantrell*, 70 Miss. 329, 12 South. 344.

⁷⁸ *Post*, p. 278, "Husband and Wife."

⁷⁹ *Merryweather v. Nixan* (1799) 8 Term R. 186.

Plaintiff's wrong may consist in conscious wrong, or in mere inadvertence or negligence.⁸⁰ But, while plaintiff's wrongdoing may prevent his recovery, to have this effect it must have been connected as a proximate cause of the tort. If a person rides his horse faster than the law allows, this does not justify a cowboy in using his lasso to throw the horse.⁸¹

SAME—THE TORT FEASOR.

- 11. Liability for torts normally extends to every person, natural or artificial, independent of personal status; but modifications of and exceptions to, or exemptions from, liability are recognized. These may be:**
- (a) General or**
 - (b) Special.**

The law of torts was a substitute for private war.⁸² It was designed to supply a sufficient remedy for the illegal harm which men were caused to suffer. Award of pecuniary compensation was the commonest, but by no means the only, form of redress. The purpose was not, primarily, to punish the wrongdoer (the criminal courts did that), but to make good the damage the injured party had suffered, and, incidentally perhaps, to deter others from evil.⁸³ Accordingly, it was generally immaterial whether the defendant in an action on a tort be natural or artificial, responsible or irresponsible, or whether his conduct was intentional or unintentional, so far as the mere right, but not the extent, of the plaintiff's recovery was concerned.⁸⁴

⁸⁰ Plaintiff's own conduct, to prevent his recovery, "cannot in any case be less than (1) a willful and intentional act of wrongdoing; (2) a voluntary assumption of the risk which resulted in injury; (3) negligence." 2 Thomp. Neg. 154.

⁸¹ Post, p. 111.

⁸² Pol. Torts; *53; Townsh. Sland. & L. 39, 44, note 1.

⁸³ Post, p. 234, "Exemplary Damages."

⁸⁴ "As long as a man keeps himself within the law by doing no act which violates it, we must leave his motive to Him who searches the heart." Black, J., in *Jenkins v. Fowler*, 24 Pa. St. 308-310. "The legal wrong is found in the injury done, and not in the motive. * * * Motive generally becomes

The earliest theory of liability for tort was, as will presently be seen, based largely on the common-law action of trespass.⁸⁵ In the simple act of trespass there is involved a minimum of mental element. Accordingly, the early cases stated the doctrine broadly, that individual status—youth, old age, insanity, or incapacity generally—had nothing to do with liability in tort.⁸⁶ This language was afterwards strained beyond the original holdings (as was done with *Weaver v. Ward*,* conspicuously) and made to cover classes of cases not contemplated when the doctrine was formulated.⁸⁷ There has been a distinct reaction against the universal application of this general principle, especially to cases in which the mental attitude of the wrongdoer is an essential part.⁸⁸

There are further variations from the normal liability for torts arising from the defendant's condition, based on exceptions which the law, for reasons of public policy, for example, recognizes. These exceptions or exemptions are of two kinds: (1) General, or those which apply indifferently to all or to most kinds of wrongs; or (2) special, which are peculiar to specific torts.⁸⁹ Thus the state cannot, in absence of its consent, be sued for any tort. Privilege of the state is a general exemption. But privileged communication, for example, is a special exception, peculiar as a defense to libel and slander. Accordingly, general exceptions will be considered in the first part,⁹⁰ and special exceptions in the second part,⁹¹ of this book.

important only when the damages for the wrong are to be estimated." *Cooley, Torts*, §§ 692-694.

⁸⁵ *Amick v. O'Hara*, 6 Blackf. 258; *Haynes v. Thomas*, 7 Ind. 38; *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397; *Leach v. Prebster*, 35 Ind. 415.

⁸⁶ *Post*, p. 28. *Weaver v. Ward*, Hob. 134, Chase, Lead. Cas. 49.

* Hob. 134, Chase, Lead. Cas. 49.

⁸⁷ *Bullock v. Babcock*, 3 Wend. 391; *Welch v. Durand*, 36 Conn. 182; *Flinn v. State*, 24 Ind. 286; *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132. *Post*, p. 28, "Theory of Liability."

⁸⁸ As in negligence.

⁸⁹ *Pol. Torts*, c. 4 ("General and Particular Exceptions").

⁹⁰ See *post*, p. 68.

⁹¹ See "Specific Wrongs."

SAME—THE WRONGFUL CONDUCT.

12. Wrongful conduct will be considered with reference to—

- (a) **The mental attitude of the wrongdoer, or mens rea;**
- (b) **The act or omission complained of, which may be complete or continuing.**

Mental Element.

Each act or omission may be involuntary, intentional, or negligent. Accordingly, in dealing with a tort, it is of increasing importance to consider how far the state of the mind of a tortfeasor at the time of the commission of the wrong influences the question.⁹² For convenience, the discussion of this question will be postponed until after the theory upon which liability for torts attaches has been considered.*

Act or Omission.

Mere intention to do wrong is not actionable. To constitute a tort, a wrong must have been committed, but it need not be done by positive act only. A tort may also arise out of omission. Thus, there may be negligence in omission as well as negligence in commission.⁹³

Misfeasance—Malfeasance—Nonfeasance.

The distinction of conduct as malfeasance, misfeasance, and nonfeasance was at one time a favorite one in the common law. Nonfeasance is the omission of an act which a person ought to do,

⁹² *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598. What is meant by the mens rea, as distinguished from the act or omission complained of, may be made clear by reference to deceit. In this wrong, inter alia, two things are to be considered: (1) Defendant's state of mind, his intention to deceive, his knowledge of the falsity of representations, and the like; (2) his consequent conduct, as the lie he tells, or the truth he suppresses when he ought to speak. Correspondingly on plaintiff's part, he suffers no wrong unless (1) he believes and relies on defendant's wrong, and (2) in consequence of such mental condition acts or fails to act, whereby he is damaged. Post, p. 328, "Deceit."

* See post, p. 28.

⁹³ *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781; *Bramwell, J., Southcote v. Stanley*, 1 Hurl. & N. 246; *Gallagher v. Humphery*, 10 Wkly. Rep. 664;

misfeasance is improperly doing an act which a person might lawfully do, and malfeasance is the doing of an act which a person ought not to do at all.⁹⁴ The difficulty with this distinction lies in the shadowy character of the line between misfeasance and nonfeasance, and the consequent tendency to lapse into merely verbal reasoning. This is specially true where the not doing of a thing is wrongful, and therefore a nonfeasance becomes a misfeasance. In consequence, the tendency at the present time is to disuse the terms.⁹⁵

Continuing or Completed Wrong.

Many torts consist of specific, distinct acts or omissions, which, however connected with consequential injuries, are the original, and, so far as the wrongdoer is concerned, the sole, cause of harm. Thus seduction cannot be repeated.⁹⁶ If assault and battery is repeated, the second attack is a new wrong.⁹⁷ Repetition of a libel may be a new publication, and give rise to a new cause of action.⁹⁸ Wrongful conduct may be said to be completed when the wrongdoer has no further control over its consequences. But a tort may be continuing. The wrong may not be distinctly separated from subsequent conduct or damages. Thus, if a person create a permanent nuisance,⁹⁹ the tort may, under some circumstances, be continuing, and the right of action will correspond.¹⁰⁰

Cotton v. Wood, 8 C. B. (N. S.) 568; Cleland v. Thornton, 43 Cal. 437; Grant v. City of Erie, 69 Pa. St. 420, and see Devereux v. Barclay, 2 Barn. & Ald. 702, Am. Lead. Cas. 432.

⁹⁴ 2 Vin. Abr. 35; Thompson v. Gregory, 4 Johns. 81; Six Carpenters' Case, 8 Coke, 146a; Coggs v. Bernard, 2 Ld. Raym. 909; Bell v. Josselyn, 3 Gray, 800.

⁹⁵ See liability of agent to third person for nonfeasance, post, p. 165. Liability of executive officers to third persons, post, p. 80.

⁹⁶ But see State v. Knutson, 91 Iowa, 549, 60 N. W. 129.

⁹⁷ Hodsoll v. Stallebrass, 11 Adol. & E. 301. And see Fitter v. Veal, 12 Mod. 542; Lamb v. Walker, 3 Q. B. Div. 389; Lord Blackburn, in Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 143. But see North, C. J., in Townsend v. Hughes, 2 Mod. 150.

⁹⁸ Every continuance of false imprisonment is a new imprisonment. Hardy v. Ryle, 9 Barn. & C. 603. And see Dusenbury v. Kielly, 58 How. Prac. 286.

⁹⁹ Whitehead v. Hellen, 74 N. C. 679; Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. 693. Post, p. 225, "Continuing Nuisance."

¹⁰⁰ Whitehouse v. Fellowes, 10 C. B. (N. S.) 765, 30 Law J. C. P. 305.

13. WHY LIABILITY ATTACHES—One theory of liability for tort is that of absolute responsibility,—that a man acts at his peril. Another is that liability is confined to moral shortcomings, and is based on culpability. Neither, as a matter of fact, is exclusively true. The law has pursued no consistent course,¹⁰¹ but there are three main categories of acts to which responsibility is affixed with reference to specific harm:

- (a) Acts done at peril with reference to that harm;
- (b) Acts done willfully with reference to that harm;
- (c) Acts done negligently with reference to that harm.¹⁰²

There is a definite theory of liability for a contract. Responsibility is based on consent, actual or implied.¹⁰³ There is a definite theory of liability for crimes. Responsibility is based on intent, actual or constructive.¹⁰⁴ But there is no consistent theory as to liability for tort. As stated in the black-letter text, there are three theories advanced: (1) The historical, based on absolute liability; (2) the philosophical, based on culpability; and (3) the practical, based on the actual state of the law. These will be considered in order.

Absolute Liability.

Perhaps the commonest conception of liability in tort is expressed by the classical phrase, that a man acts at his peril. He insures the world against wrong on his part. The duty to avoid harm to others is regarded as absolute. Breach of that duty, and consequent damage, is sufficient to create responsibility without reference to his mental attitude,—that is, his consciousness or intention. Whether legal wrong has been done for which the law affords reparation in damages depends upon the nature of the conduct, and cannot consistently be made to depend upon the motive of the person

¹⁰¹ O. W. Holmes, Jr., 7 Am. Law Rev. 652; Holmes, Com. Law, 79; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391.

¹⁰² John H. Wigmore, in 7 Harv. Law Rev. 455, 456.

¹⁰³ Clark, Cont. 3, 4, 752.

¹⁰⁴ Clark, Cr. Law, 43, 44.

doing it.¹⁰⁵ This view of the law had its origin in the early Germanic conceptions of liability.

The primitive conception of the law of torts is well expressed in *Lambert v. Bessey*:¹⁰⁶ "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering. * * * For, though a man doth a lawful thing, yet, if any damage due thereby befall another, he shall answer for it if he could have avoided it." "The old writs in trespass did not allege, nor was it necessary to show anything, savoring of culpability. It was enough that a certain event had happened; and it was not even necessary that the act should have been done intentionally, though innocently."¹⁰⁷ In *Underwood v. Hewson*,¹⁰⁸ the defendant was uncocking his gun. It accidentally went off, and wounded a bystander. The defendant was charged, and holden liable in trespass. Interference with the person by a blow;¹⁰⁹ or restraining freedom of locomotion, or interference with real property by going upon it, or by converting personal property to one's

¹⁰⁵ *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57. And see *Jenkins v. Fowler*, 24 Pa. St. 308.

¹⁰⁶ T. Raym. 421.

¹⁰⁷ 7 Am. Law Rev. 652. See *Leame v. Bray*, 3 East, 593. In *Grant v. Moseley* (1856) 29 Ala. 302, it was distinctly held that damages resulting from an accident could be recovered.

¹⁰⁸ 1 Strange, 596. This decision has never been questioned. *Cole v. Fisher*, 11 Mass. 136. And see *Weaver v. Ward*, Hob. 289, where a soldier was held liable for accidentally shooting a comrade with whom he was practicing at arms. Cf. *Dickenson v. Watson*, T. Jones, 205. In America it has been distinctly held that when an injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of action, as where one by the negligent handling of a gun kills another, it is no defense that the act occurred through inadvertence and without the wrongdoer's intending it; that it must appear that the injury was inevitable, and utterly without fault on the part of the alleged wrongdoer. *Morgan v. Cox*, 22 Mo. 373. A hunter who kills a dog by mistake for a wolf will be liable to the owner though he act in good faith, and the dog may look like a wolf. *Ranson v. Kitner*, 31 Ill. App. 241. And see *Taylor v. Rainbow*, 2 Hen. & M. (Va.) 423; *Hodges v. Weltberger*, 6 T. B. Mon. 337; *Sullivan v. Murphy*, 2 Miles (Pa.) 298; *Welch v. Durand*, 36 Conn. 182; *Chataigne v. Bergeron*, 10 La. Ann. 690.

¹⁰⁹ *Chapman v. State*, 78 Ala. 463.

own use,¹¹⁰ is generally regarded as conduct which violates absolute duties, and which creates corresponding absolute rights to redress.

Legal remedies being substituted for personal war, it was natural that liability for torts should be regarded from the point of view of the man who suffered, and not from the point of view of the intention or mental attitude of the cause of that harm.

The category of things done at peril has been materially increased by an important class of cases more or less generally recognized. These cases involve a duty to insure safety¹¹¹ as distinguished from the general class now under consideration, namely, the duty to insure against wrong generally, on the one hand, and from the duty merely to exercise proper care in view of all circumstances, on the other. Thus, in *Fletcher v. Rylands*,¹¹² it was held that if a person gathers water in dangerous quantities on his own land, and it escapes and damages another's, the latter can recover, although the former exercised due care. A person is bound, under such circumstances, to insure the safety of third persons against harm from the dangerous agency he has collected on his premises.

Theory of Culpability.

Great jurists have inclined to trace responsibility for torts to the mental element, as is done in the cases of crimes and contracts. Liability they would confine to moral shortcomings. Liability is so based in the wrongs of fraud, deceit, slander, libel, and malicious prosecution. And, even in cases of damage by direct act of force, it is insisted that the rule is that the "plaintiff must come prepared with evidence to show either that the intention was unlawful or that the defendant was in fault; for, if the injury was unavoidable and the conduct of the defendant free from blame, he will not be liable."¹¹³ Critical modern investigation is not only ques-

¹¹⁰ *Hollins v. Fowler*, L. R. 7 H. L. 757; *Eten v. Luyster*, 60 N. Y. 252.

¹¹¹ *Pol. Torts*, c. 12.

¹¹² L. R. 1 Exch. 265. Cf. *Losee v. Buchanan*, 51 N. Y. 476.

¹¹³ *Shaw, C. J.*, in *Brown v. Kendall*, 6 Cush. 292. "It is impossible to conceive the idea of a tort as separate and apart from an intentional wrong and injury, or such negligence or other misconduct as necessarily to imply such wrong or injury. A scienter is the very gist of a tort. To say that one may

tioning, but denying,¹¹⁴ and courts are recognizing¹¹⁵ many exceptions to, the clearest cases of absolute liability. The change has been wrought largely through recognition of the doctrine that a person cannot be held liable for a wrong of which he was not rationally a cause. This theory accords with the common-sense view of the law,—that no man should be held responsible in damages unless he is at fault.

True Theory.

The true view is that the law has not adopted any logically consistent theory of liability.¹¹⁶ At the one extreme there are cases in which culpability is not an element, in which the defendant is held liable although he may not be to blame; as trespass to person or property, and breach of duty to insure safety. At the other extreme moral wrong is material to wrongs of malice and fraud.¹¹⁷ Negligence is a common battle ground. It is vigorously insisted that negligence is and that it is not a state of the mind;¹¹⁸ and it is clear that the very authorities who deny that negligence is a state of the mind recognize that as soon as a defendant acts not inadvertently, but willfully, his wrong is no longer negligence.¹¹⁹ It would seem that the theory of personal culpability as the basis of liability in tort is gaining ground.¹²⁰

recover in tort without proving a scienter is to say that he may omit from his proof the chief element of his case." McCrary, J., in *Shippen v. Bowen*, 48 Fed. 659.

¹¹⁴ Post, p. 456, "Negligence"; *Brown v. Kendall*, 6 Cush. 292. *Harvey v. Dunlop*, Hill & D. 193; *Nitro-Glycerine Case*, 15 Wall. 524; *Lansing v. Stone*, 37 Barb. 15; *Center v. Finney*, 17 Barb. 94; *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132; *Dygert v. Bradley*, 8 Wend. 470; 1 Hill, Torts, c. 5, § 9; 2 Greenl. Ev. 85.

¹¹⁵ See, for instance, cases of trespass where the act is involuntary, and cases of damage by cutting timber, intentionally or unintentionally. Post, p. 378, "Trespass." And see post, p. 415, "Conversion"; *Holmes v. Mather*, L. R. 10 Exch. 261; *Stanley v. Powell* [1891] 1 Q. B. 86; Ames, Torts, and cases cited in note at page 64. In the absence of negligence, a man who accidentally shoots another is not liable in tort. *Stanley v. Powell* [1891] 1 Q. B. 86.

¹¹⁶ Holmes, Com. Law, 79-81; 7 Am. Law Reg. 48, 652.

¹¹⁷ Post, c. 9.

¹¹⁸ Post, p. 449, "Negligence."

¹¹⁹ 16 Am. & Eng. Enc. Law, tit. "Negligence," p. 389.

¹²⁰ Post, p. 463; *Holmes v. Mather*, L. R. 10 Exch. 261; *Stanley v. Powell*

Same—Unintentional Torts.

In many instances liability for torts is based on the wrong done, and not on the reason why. In this class of cases, the intent with which an act is done is wholly immaterial in fixing liability. To constitute a tort there must be a violation of legal duty. Mere intention to do wrong, not resulting in conduct which violates a right or duty, is not actionable. You cannot sue a man for the state of his mind.¹²¹ It follows that wrongful intention cannot make lawful conduct unlawful,¹²² or a proper intention make unlawful conduct lawful.¹²³ "The best intention cannot prevent an act from being a nuisance when it otherwise is such, and the worst intention cannot make an act a nuisance when it otherwise is not."¹²⁴

[1891] 1 Q. B. 86; post, p. 415, "Conversion"; post, p. 303, "Libel and Slander"; *Cork v. Blossom*, 162 Mass. 330, 38 N. E. 495, 8 Harv. Law Rev. 225; *Berger v. Gas Light Co.*, 60 Minn. 296, 62 N. W. 336. The fact that responsibility for harm consequent upon commercial use of electricity has been subjected to the rules of negligence, and not governed by the doctrine of duty to insure safety,—post, p. 462, "Negligence,"—is significant.

¹²¹ *Sheple v. Page*, 12 Vt. 519; *Kimball v. Harman*, 34 Md. 407; *Herron v. Hughes*, 25 Cal. 555; *Jones v. Baker*, 7 Cow. 445; *Page v. Parker*, 43 N. H. 363; *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491. Just as at criminal law, there must not only be wrongful intent, but act. Bish. Cr. Law, § 206; Clark, Cr. Law, 45. The original view of the law was that an act done in pursuance of an unlawful intent is not ground for an action unless damage recognized by the law resulted. *Haycraft v. Creasy*, 2 East, 92; *Clinton v. Myers*, 46 N. Y. 511; *Frazier v. Brown*, 12 Ohio St. 294; *Estey v. Smith*, 45 Mich. 402, 8 N. W. 83; *Kiff v. Youmans*, 86 N. Y. 324.

¹²² *Norcross v. Otis Bros. & Co.*, 152 Pa. St. 481, 25 Atl. 575; *Hunt v. Simonds*, 19 Mo. 583; *White v. Carroll*, 42 N. Y. 161; *Stearns v. Sampson*, 59 Me. 568.

¹²³ *Amick v. O'Hara*, 6 Blackf. 258; *Porter v. Thomas*, 23 Ga. 467; *Moran v. Smell*, 5 W. Va. 26; *Ex parte Milligan*, 4 Wall. 2.

¹²⁴ Black, J., in *Jenkins v. Fowler*, 24 Pa. St. 308-310. And see *Fowler v. Jenkins*, 28 Pa. St. 176; *Bonnell v. Smith*, 53 Iowa, 281, 5 N. W. 128; *Heywood v. Tillson*, 75 Me. 225; *Phelps v. Nowlen*, 72 N. Y. 39. To constitute a tort, there must also be a violation of a legal duty. Thus, malice does not make the diversion of subterranean waters actionable if such diversion would not be actionable if the motive were a proper one. *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49. So in *Mahan v. Brown*, 13 Wend. 261, maliciously erecting a high fence on defendant's own premises was held not to be actionable. "The plaintiff in this case has only been refused the use

In many cases this reasoning has not been followed, and there is a distinct tendency to determine liability by reference to defendant's state of mind, as will be seen when we come to consider malicious wrongs. Thus, there are uses of property resulting in *damnum absque injuria* if the motive is proper, but which are actionable if done maliciously.¹²⁵ But in many cases the intent of the tortfeasor is still wholly unimportant. He may be held liable though he may not be conscious of wrongdoing. Thus, there may be intention to do the act which produces injury without intention of violating the rights of another, and despite the exercise of due care in the entire transaction. If a person buys and takes away property in violation of the rights of the owner, he is liable for the value thereof in an action for conversion.¹²⁶ If one by bona fide mistake, notwithstanding every precaution to keep within his own lines, goes upon the lands of another, he is liable in trespass.¹²⁷ Again, there may be intention to do a lawful act, and liability may attach for injuries because of unintended consequences, without reference to the exercise of care. Thus, in an assault there may be unintentional injury from an intentional act. If, in sport, one throws something at another, and injury to a third person ensues, this is actionable.¹²⁸ Again, there may be no inten-

of that which does not belong to her; and, whether the motive of defendant is good or bad, she had no legal cause of complaint." And see *Smith v. Johnson*, 76 Pa. St. 191; *Thornton v. Thornton*, 63 N. C. 211; *Jenks v. Williams*, 145 Mass. 217; *Harwood v. Tompkins*, 24 N. J. Law, 425; *Panton v. Holland*, 17 Johns. 92. Cf. *Gallagher v. Dodge*, 48 Conn. 387 (as to statutory prohibition of malicious erection).

¹²⁵ Thus, it was said in *Chesley v. King*, 74 Me. 164: "It cannot be regarded as a maxim of universal application that malicious motives cannot make that a wrong which in its own essence is lawful." And see *Stevens v. Kelley*, 78 Me. 445, 6 Atl. 868. To induce one to break a contract, if there is neither malice nor fraud, is not actionable. *McCann v. Wolff*, 28 Mo. App. 447. But malicious interference with contract is a generally recognized tort. *Lumley v. Gye*, 2 El. & Bl. 216. See post, p. 362.

¹²⁶ *Hilbery v. Hatton*, 2 Hurl. & C. 822.

¹²⁷ *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; *Hazelton v. Week*, 49 Wm. 661, 6 N. W. 309; *Cate v. Cate*, 44 N. H. 211.

¹²⁸ *Peterson v. Haffner*, 59 Ind. 130; *Perkins v. Stein*, 94 Ky. 433, 22 S. W. 649. And see *Corning v. Corning*, 6 N. Y. 97; *Wright v. Clark*, 50 Vt. 130; *Osgood v. Yett*, 1 Coldw. 230; *Knott v. Wagner*, 16 Lea (Tenn.) 481, 1 S. W.

tion of doing harm, but, for want of due care to guard against injury to others, conduct innocent in itself may become tortious. This want of advertence to natural and probable consequences attaches liability by what is called "negligence." Thus, if a person's servant drive so carelessly in a public street as to come into collision with a carriage, and thereby cause the horse attached to the same to take fright and run away, and injure another's person and property, the master is liable in tort.¹²⁹ If a druggist negligently delivers a harmful drug when a harmless one is asked for, the absence of intention is no excuse.¹³⁰

Same—Intentional or Malicious Torts.

There may also be an intention, not only to do an act, but also to violate a right in so doing; in other words, actionable conduct may be accompanied by consciousness of wrongdoing. Malice, in legal phraseology, signifies the contemplation of the doing of a wrongful act towards another person. In its legal sense, it ranges from malevolence, as in an injury committed in revenge, to the mere conscious violation of a right without just cause or excuse, as in the case of a mere trespass. Malice is said to have been present whenever the injurer contemplated harm to the person injured, though he may also have entertained a desire to benefit himself, and though the harm contemplated may be merely incidental to the fruition of that desire. It is present, therefore, though in different degrees, in the highwayman who murders a man for his purse, and the trespasser who gets over a fence to take an apple. Of course, the malice need not always be for the benefit of the wrongdoer.¹³¹ Whenever there is a sinister or improper motive actually present in the mind of the wrongdoer, the malice is said to be malice in fact, express malice, or actual malice.¹³² This is proved by evidence as to the state of the mind of the wrongdoer. Malice in law, or implied malice, does not

155; *Anderson v. Arnold's Ex'r*, 79 Ky. 370; *James v. Campbell*, 5 Car. & P. 372; *Ball v. Axten*, 4 Fost. & F. 1019.

¹²⁹ *McDonald v. Snelling*, 14 Allen (Mass.) 290.

¹³⁰ *Brown v. Marshall*, 47 Mich. 576, 11 N. W. 392; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350.

¹³¹ *Chesley v. King*, 74 Me. 164.

¹³² *Smith v. Rodecap*, 5 Ind. App. 78, 31 N. E. 479; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775. Whether or not the fact that defendant's conduct

refer to the consciousness of the wrongdoer; nor to motive, but to knowledge of wrongdoing. It is the inference of law from facts in evidence. It is proved by showing actual occurrences.¹³³

Malice in law or in fact is an essential ingredient of certain forms of specific wrongs or torts, such as malicious abuse of process, malicious prosecution, libel and slander, fraud and deceit.¹³⁴

14. HOW LIABILITY ATTACHES—Liability for conduct may attach in one or more of five ways, namely:

- (a) By personal commission;
- (b) By consent or command;
- (c) By virtue of relationship;
- (d) Because of instrumentalities; and
- (e) Because of conduct operating essentially as estoppel.

Personal Commission.

Where wrongs are committed by a man in person, as where one man assaults, slanders, or imprisons another, or trespasses upon or takes the property of another, or carelessly does him harm, the tort is properly his own. It makes no difference, so far as the mere fact of liability is concerned, whether he committed such wrongs by himself, or in conjunction with third persons.

Consent or Command.

"Qui facit per alium, facit per se," is a maxim which, in the law of torts, has created much confusion. In its simplest application thereto, it expresses a manifest truth,—that whoever commands the commission of a wrong by another does that wrong himself, not by actual, personal commission, but by constructive identity. If the

complained of was intended as a joke may avail as a defense depends upon a reasonable expectation of a practical joke from antecedent conduct. *Wartman v. Swindell*, 54 N. J. Law, 589, 25 Atl. 356.

¹³³ Post, p. 327, "Malicious Wrongs." Malice may be found either in a wrongful motive, or, in many cases, in a wrongful act, whatever the motive. *Bigelow*, Torts, 5, note 1. Malice in law may arise from an act done wrongfully and willfully, without reasonable excuse or probable cause, not necessarily only from an act done from ill feeling, spite, or desire to injure another. *Tucker v. Cannon*, 32 Neb. 444, 49 N. W. 435.

¹³⁴ Post, pp. 281, 327.

command or consent to the tort is prior to the wrong complained of, he may be said to have authorized it. It will appear, however, that some torts are not, in their nature, susceptible of being committed by deputy, as the wrongs of seduction and slander. The command or consent which makes another's tort one's own may be subsequent to the wrong. It is then called "ratification" or "adoption." What ratification or adoption attaches liability for another's tort will, for sake of convenience, be presently discussed in this chapter, at some length.

Relationship.

When, however, the maxim, "Qui facit per alium, facit per se," is applied beyond this primary meaning, to cases where liability may be independent of consent or command, there is much confusion. In many jurisdictions now, and always at common law, the husband was held liable for the torts of his wife.¹³⁵ Here the civil responsibility followed from the relation existing between them. There might or might not be consent on his part. If there was, the tort would properly be his actual wrong; if not, it would be his by construction only. There are many cases, however, in which the courts have confused the liability which is based on consent or command and the liability which follows from a relationship to which recognized responsibilities are attached. If a master assists a servant in an assault, they are actual joint tortfeasors. If he commands his servant to assault, they are constructively joint tortfeasors. This is also true when he directs his servant to do something which necessarily or naturally involves an assault. But when a servant, contrary to orders, and without the knowledge of the master, assaults, for example, the master's customer or the master's passenger, the master is sometimes held responsible, not because the tort is really his, but because of the relationship he bears both to the servant and to the injured man. If he sustains no relationship to the complainant which imposes on him a duty which his servant violates, there is no responsibility.

Instrumentalities.

Whoever uses, owns, or controls things which are in themselves dangerous, as a wild beast, or which may become dangerous in fact,

¹³⁵ Post, p. 125, "Husband and Wife."

as an engine, may become liable for harm done by such instrumentalities. The principles upon which liability is attached are not in entire harmony, but all agree that liability under some circumstances may attach for the harm they produce. An instrumentality may be personal or impersonal. The personal instrumentality may be rational or irrational.¹³⁶ The impersonal instrumentality may be animate, as an animal of wild or domestic nature, or inanimate, as a ponderous article, a weapon, an explosive, or a thing in motion.¹³⁷ Now, where a dangerous impersonal inanimate instrumentality—for example, a torpedo—does damage by the unauthorized act of a servant, there is great, and it would seem unnecessary, confusion in tracing civil responsibility for the wrong. Liability because of relationship of master and servant is one consideration; liability because of instrumentality is another and distinct one. Even the most apparently innocent things, like real estate, may become instrumentalities of harm.

By Conduct Operating as an Estoppel.

In most cases liability for tort attaches in one or more of the four ways heretofore considered. This classification, however, in the nature of things is neither mutually exclusive nor exhaustive. There are, in addition, other ways in which liability for tort may be attached.

It is constantly said that where harm has been inflicted, as between two innocent parties, he who caused the harm should suffer.¹³⁸ This principle, as applied, is likely to lead into error. As a consideration

¹³⁶ A master may be held liable for the torts of his lunatic servant. *Cole v. Corporation of Nashville*, 4 Sneed (Tenn.) 162.

¹³⁷ It is said in an early case that, "where one has filth deposited on his premises, he whose dirt it is must keep it that it may not trespass." See *Tenant v. Goldwin*, 1 Salk. 360.

¹³⁸ As to actionable negligence in clothing a person with title, name, and authority, see *McCabe v. Brown* (Tex. Civ. App.) 25 S. W. 134; *Curtis v. Janzen*, 7 Wash. 58, 34 Pac. 131; *Blaisdell v. Leach*, 101 Cal. 405, 35 Pac. 1019; *Clarke v. Milligan*, 58 Minn. 413, 59 N. W. 955. See, also, *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, and 33 Pac. 323; *Foreman v. Weil*, 98 Ala. 495, 12 South. 815; *Hollis v. Harris*, 96 Ala. 288, 11 South. 377; *Lawrence v. Investment Co.*, 51 Kan. 222, 32 Pac. 816; *Dolbeer v. Livingston*, 100 Cal. 617, 35 Pac. 328. And see post, p. 152, "Liability of Master to Third Persons for Torts of Servant—Fraud."

of natural equity it is given due weight by courts, but it proceeds on the false assumption that, where damage is actually done, somebody must be held responsible. Still, there are cases in which a person may be held responsible in an action *ex delicto* when he could not be said to have committed the tort in any ordinary sense. If a man illegally enriches himself to the impoverishment of another, the law will make him disgorge. This result is sometimes worked out through implying consent after the tort; that is, by saying the retention of benefit operates as an implied ratification of another's wrong. This, however, is an unnecessary and fictitious indirection; for the law at an early date recognized direct liability, on the principle here involved, in the large and important class of cases where the impoverished party could sue in tort or in *assumpsit*.¹³⁹ The measure of recovery is the amount which defendant cannot in conscience keep.¹⁴⁰ Thus, while an executor is ordinarily not liable for the tort of the deceased, still, where the estate of deceased had been unjustly enriched at another's expense, the latter could sustain his action in tort.¹⁴¹

¹³⁹ *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892; *National Trust Co. v. Gleason*, 77 N. Y. 400; *Keener*, *Quasi Cont.* 160, quoting *Hambly v. Trott*, *Cowp.* 371; *Powell v. Rees*, 7 Adol. & E. 426; *Ex parte Adamson*, 8 Ch. Div. 807; *Patterson v. Prior*, 18 Ind. 440; *Tightmeyer v. Mongold*, 20 Kan. 90; *Fanson v. Linsley*, *Id.* 235; *New York Guaranty Co. v. Gleason*, 78 N. Y. 503. "It is true," says Mr. Keener, "that you cannot sue in *assumpsit* a person who commits an assault and battery, while you can sue in *assumpsit* one who steals your goods and sells them. But it is submitted that the true reason is not that suggested by a learned writer [Cooley, *Torts*, 108], that it would be absurd in the one case to assume that the defendant promised to make compensation for the damage done, while in the other case there are facts which would support the implication of a promise. In the one case there is no enrichment, in the other there is; hence in the one case your remedy is in tort only, while in the other you can sue in quasi contract."

¹⁴⁰ *Keener*, *Quasi Cont.* 183.

¹⁴¹ "If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer,—as beating or imprisoning a man, etc.,—there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale

So, in cases of fraud, the principal may be guilty of no personal wrong, and not be guilty because of relationship with the agent who committed the tort, and still be held liable because of unjust enrichment.¹⁴² And in respect, also, to agents, "the rule is that where one has reasonably and in good faith been led to believe, from appearance of authority which the principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency (and consequent liability) to the prejudice of one so dealing."¹⁴³

The principle which is involved in these cases is natural equity and public policy, and in general may conveniently, if not always actually or consistently, be said to operate by way of estoppel in pais. It would seem, indeed, that this underlying principle determines, in a large measure, the extent of the master's liability in other cases than those referred to. The master is held liable for the tort of his servant, according to this view, to the extent that public policy justifies and demands.

The recognition of rights and duties by the law is largely a matter of policy. Certain distinctions may exist in nature; but, essentially, the law is an artificial science. There are no rights except such as the law sanctions. Accordingly, the law is continually reaching a conclusion as a matter of utility, and then justifying by a process of reasoning as unsatisfactory as it is unreal. This seems to be the case, for example, with the rules as to the extent of liability of the master to his servant or of the master to third persons not in his employ for the torts of his servant.

of the trees he shall. So far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged." Lord Mansfield in *Hambly v. Trott*, Cowp. 371.

¹⁴² *Continental Ins. Co. v. Insurance Co. of Pennsylvania*, 2 C. C. A. 535, 51 Fed. 884; *Albitz v. Railway Co.*, 40 Minn. 476, 42 N. W. 394.

¹⁴³ *Gilfillan, C. J.*, in *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224-229, 53 N. W. 1061.

15. Liability for torts committed by another person may attach by ratification of such wrong.¹⁴⁵
16. A valid ratification may be either express or implied, and to constitute a valid ratification
- (a) The act must have been done in the interest of the person sought to be charged by ratification.
 - (b) Such person must have adopted the conduct with full knowledge of its tortious nature, and with actual or imputed intention to ratify.

The conduct ratified must have been in interest of ratifier. In *Wilson v. Tumman*,¹⁴⁶ the principle was laid down that "when A. does an act as agent for B., without communication with C., C. cannot afterwards, by adopting the act, make A. his agent, and incur liability or take benefit under the act of A." This was applied to a person's inability to make a sheriff his agent by adopting the torts of the sheriff in seizing goods under a proper writ.

While ordinarily the conduct of a principal or master will be construed favorably to ratification,¹⁴⁷ as to torts the fairer rule is that to hold one responsible for an act not committed by himself, nor by his order, his adoption of or an assent to the same must be clear and explicit, and made with full knowledge of the tort, and that

¹⁴⁵ It has been questioned whether a bare personal trespass can be made the wrong of another by adoption. *Bishop v. Montague*, Cro. Eliz. 824; *Freeman v. Adams*, 9 Johns. (N. Y.) 116. This is on the ground that the act, being in violation of law, could not be lawfully delegated, and therefore cannot be lawfully ratified. *Zottman v. San Francisco*, 20 Cal. 96; *Armitage v. Widoe*, 36 Mich. 124; *Turner v. Phoenix Ins. Co.*, 55 Mich. 236, 21 N. W. 326; *Mechem, Ag.* §§ 111-115. The doctrine, however, has been well established from an early date. *Dempsey v. Chambers*, 154 Mass. 330-333, 28 N. E. 279. The earlier authorities will be found collected in *Dempsey v. Chambers*, supra. An early case from the Year Book 7 Hen. IV. fol. 34, pl. 1, is given in the note to *Wilson v. Tumman*, 6 Man. & G. 236. And see *Judson v. Cook*, 11 Barb. (N. Y.) 642, and cases cited; *Ring. Torts*, 50; *Heldenheimer v. Loring*, 6 Tex. Civ. App. 560, 26 S. W. 99; *Cooley, Torts*, § 127; *Pig. Torts*, 71; *State of Wisconsin v. Torinus*, 26 Minn. 1, 3, 49 N. W. 259, collecting cases.

¹⁴⁶ *Wilson v. Tumman*, 6 Man. & G. 236; *Fitler v. Fossard*, 7 Pa. St. 540; *Morehouse v. Northrop*, 33 Conn. 380; *Griswold v. Haven*, 25 N. Y. 595; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Lane v. Black*, 21 W. Va. 617.

¹⁴⁷ *Johnson v. Carrere*, 45 La. Ann. 847, 13 South. 195; *Mechem, Ag.* § 177.

the injured party claims that there has been a tort committed.¹⁴⁸ Thus, where the husband makes false representations in order to sell land standing in his name, but bought with his wife's money, her acceptance of the purchase money without knowledge of the fraud is not a ratification of it.¹⁴⁹ In addition to the knowledge of the facts to be ratified, there must also be an intention to ratify. The intention to ratify cannot be inferred from mere expressions of regret conveyed to the person injured, and promises to investigate the circumstances, nor other acts which may be treated as matters of friendship or favor merely.¹⁵⁰ Retention of an employé who has committed an unauthorized wrong is not ordinarily evidence of ratification of his wrong.¹⁵¹ Taken in connection with other circumstances,—for example, promotion after a brakeman had maltreated and assaulted a passenger,—it may be necessary for the jury to determine whether or not there was a ratification.¹⁵² Retention of benefit attaches liability. The principal is held rather to be estopped from denying the liability than to have ratified the conduct of the wrongdoer in its entirety.¹⁵³

17. Ratification is the equivalent of antecedent authority. It proceeds on the theory of election, not of estoppel, and establishes the relation of the master and servant or principal and agent from the beginning. In consequence,

¹⁴⁸ *Tucker v. Jerris*, 75 Me. 184; *West v. Shockley*, 4 Har. 287; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74; *Abbott v. Kimball*, 19 Vt. 551; *Lewis v. Read*, 13 Mees. & W. 834; *Buttrick v. Lowell*, 1 Allen (Mass.) 172; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314.

¹⁴⁹ *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022.

¹⁵⁰ *Roe v. Railway Co.*, 7 Exch. 36; *Edwards v. Railway Co.*, L. R. 5 C. P. 445-449; *Buttrick v. Lowell*, 1 Allen (Mass.) 172.

¹⁵¹ *Gulf, C. & S. F. Ry. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495; *Gulf, C. & S. F. Ry. Co. v. Reed*, 80 Tex. 362, 15 S. W. 1105; *Deacon v. Greenfield*, 141 Pa. St. 467, 21 Atl. 650.

¹⁵² *Bass v. Chicago & N. W. Ry. Co.*, 42 Wis. 654. And see *Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446, 57 N. W. 144.

¹⁵³ *Post*, p. 152, "Fraud"; *Pig. Torts*, 71; *Hyde v. Cooper*, 26 Vt. 552; *Lewis v. Read*, 13 Mees. & W. 834; *Hower v. Ulrich*, 156 Pa. St. 410, 27 Atl. 37. So if a partner willfully or through mistake commits a trespass on timber land, and takes timber therefrom, his co-partner is liable for the act, of which he

- (a) The person ratifying is liable for all torts committed by his adopted deputy, servant, or agent, in the course of employment, and not merely those which he specifically adopts. Ratification is total, not partial.
- (b) Ratification does not ordinarily discharge the liability of tort feasons to third persons, but it does as to the person ratifying.

Ratification establishes the relation of master and servant or principal and agent *ab initio*. If a wrong is done by a complete stranger, ratification of what he undertook to do generally, but not of the trespass directly, constitutes him a servant, and creates liability. Thus, if a stranger delivers coal for a person, and in doing so does damage, that person, by adopting the general employment, becomes liable for the specific wrong. "Ratification goes to the relation, and establishes it *ab initio*."¹⁵⁴ The adoption or ratification by a principal of the wrongful act of his agent may be implied from the conduct of the principal. He cannot ratify the conduct in part, and repudiate in part. If he ratifies part, he ratifies all.¹⁵⁵

Ratification does not release tort feasons. The liability of the master or principal which follows ratification is additional, and the wrongdoer also remains liable. So far as the liability of the latter to third persons is concerned, the injured person is not a party to the ratification, and cannot be compelled to lose his right of action against the servant by any act of the master. Authority to do wrong is never a defense.¹⁵⁶ It is accordingly immaterial whether the authority to do wrong preceded or followed the wrongful act. The liability of the principal is an additional, and not a substituted, one. But the proposition is not a universal one. Where a per-

may have known nothing, if the firm retain the timber after the notification of the wrong done. *U. S. v. Baxter*, 46 Fed. 350.

¹⁵⁴ *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279; *Nims v. Mt. Hermon Boys' School* (1893) 160 Mass. 177, 35 N. E. 776.

¹⁵⁵ *Byne v. Hatcher*, 75 Ga. 289; *Mechem, Ag.* 130, collecting cases; *Farmers' Loan, etc., Co. v. Walworth*, 1 N. Y. 433.

¹⁵⁶ Post, p. 164, "Liability of Agent to Third Persons"; *Wright v. Eaton*, 7 Wis. 595.

son assuming to act for a city, changed the grade of a street, to the injury of an abutting landowner, and the city ratified his act, though after suit brought, it was held that the act was justified.¹⁵⁷ As between the person ratifying the wrong, and the wrongdoer, however, it would seem clear that by ratification the principal and master assumes the responsibility of the transaction, with all its advantages and all of its burdens. He has consented to the wrong, and *volenti non fit injuria*. Ordinarily he cannot recover from the wrongdoer.¹⁵⁸

18. CONNECTION AS CAUSE.—Liability for conduct does not attach unless the conduct was the proximate cause of the injury complained of.

As in nature every change is the result of some cause, so it is in the legal relations between man and man. The determination of legal cause has three principal objects: (a) that where there has been a wrong committed, for which liability should attach, the person who is to be held answerable in an action in a court of common law should be selected; (b) that if the person injured be himself a wrongdoer, in any respect, it can be determined whether or not his wrongdoing should disentitle him from recovering;¹⁵⁹ and (c) that the extent of the injurious consequences for which the person thus ascertained to be responsible to such injured person, not disentitled, be fixed.¹⁶⁰

In determining liability for a given harm suffered, the fundamental question is, did the party charged cause the harm? In ascertaining this the courts naturally select the proximate, as distinguished from a remote, cause. As Lord Bacon said, "It were infinite for the law to judge of cases and other impulsions one of another, and therefore contenteth itself with the immediate cause, and judgeth of acts by them, without looking to any further de-

¹⁵⁷ *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264.

¹⁵⁸ *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552; *Pickett v. Pearsons*, 17 Vt. 470; *Woodward v. Suydam*, 11 Ohio, 361; *Bray v. Gunn*, 53 Ga. 144; *Foster v. Rockwell*, 104 Mass. 167.

¹⁵⁹ See post, p. 111, "Variations in Right to Sue."

¹⁶⁰ See post, p. 207, "Damages."

gree.”¹⁶¹ “In jure, non remota causa sed proxima spectatur.”¹⁶² So far as mere definition is concerned, that of Jenkins, J., in *Goodlander Mill Co. v. Standard Oil Co.*,¹⁶³ is as adequate as any: “The proximate cause of an injury is that which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. * * * The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof.” But what is a proximate cause is a matter requiring great nicety to determine.

19. Conduct is a proximate cause when, in the usual course of nature under the circumstances of the case, the damage complained of results as a natural and probable consequence.

A number of theories of causation have been favorably regarded by jurists. The one which has met with most general acceptance is that of natural and probable consequences.¹⁶⁴ A legal wrong, constituting an invasion of another's rights, will produce damages as the natural, necessary, and proximate result. But where an act or omission is not such a distinct legal wrong, and can only become a wrong to individuals through injurious consequences resulting therefrom, such consequences must not only be shown, but both pleadings and evidence must show that the acts or omissions were the proximate and sufficient cause of the consequences.¹⁶⁵ This is an application of the familiar principle that a man is presumed to intend the natural and probable consequences of his own acts, and is held responsible therefor. Several standards have been suggested for determining what are natural and probable consequences.

¹⁶¹ Bac. Max. Reg. 1.

¹⁶² Broom, Leg. Max. 216-228, 853; *Hoag v. Railroad Co.*, 85 Pa. St. 293.

¹⁶³ 11 C. C. A. 253, 63 Fed. 400-407.

¹⁶⁴ An examination of any digest on proximate and remote damages will convince as to this point. “Natural and necessary consequences.” *Ryan v. New York Cent. Ry. Co.*, 35 N. Y. 210, reviewing *Scott v. Shepherd*, 2 W. Bl. 503; *Vandenburgh v. Truax*, 4 Denio (N. Y.) 464; *Guille v. Swan*, 19 Johns. (N. Y.) 381.

¹⁶⁵ Cooley, Torts, 60.

This matter will be considered subsequently under the subject of proximate and remote damages. The results of that consideration may be anticipated, so far as to point out that the courts have pursued no absolutely consistent line between two extreme views of the proper way for determining natural and probable consequences. At the one extreme they are said to be such as would ordinarily occur in the course and constitution of nature, whether it could or should have been foreseen by the wrongdoer at the time of the wrong or not. At the other extreme what the wrongdoer can reasonably be held to have anticipated is regarded as the test. The tendency is to enlarge, rather than to limit, the range of natural and probable consequences.¹⁶⁶ In following the natural and probable effects of a wrongful action, the courts recognize that at some stage a cause becomes "remote," and the wrongful conduct ceases to be actionable. The force is exhausted.¹⁶⁷ But, as will be seen in the subsequent discussion of damages proximate or remote, there is great uncertainty as to where this point is reached.

Conspicuous Antecedent.

The ideas of John Stuart Mill as to the relation of cause and effect, and his terminology of antecedent and subsequent, have been judicially recognized. "The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily, that condition is usually termed the cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate in the event."¹⁶⁸ Indeed, it has

¹⁶⁶ Pol. Torts, 31.

¹⁶⁷ Bish. Noncont. Law, §§ 44, 45. A vendor of gunpowder to an inexperienced boy may be held liable for damage caused by an explosion burning the boy. *Carter v. Towne*, 98 Mass. 567. But if, after the sale was made, the boy carried it home, and gave it to the custody of his parents, and part of it had been fired off, with their permission, before the explosion occurred by which he was injured, then the wrongful act of defendant in selling the gunpowder would not be the direct, proximate, or efficient cause of the injury. *Carter v. Towne*, 103 Mass. 507.

¹⁶⁸ Appleton, C. J., in *Moulton v. Sanford*, 51 Me. 127, 134. "Efficient predominating." *Dole v. Insurance Co.*, 2 Cliff. 431, Fed. Cas. No. 3,966; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117. "Proximate or efficient." North-

been the basis of an important line of decisions.¹⁶⁹ It would appear probable that in a great many cases—perhaps in the majority of cases—the jury to whom the questions of connection as cause are finally referred will determine such questions by the use of this standard.

Cause a Question of Fact.

In determining the juridical cause, courts incline to decide each case on its own facts, so far as possible.¹⁷⁰ However, there are distinct groups of cases with respect to which courts are governed by the principle *stare decisis*.¹⁷¹ And finally it is generally admitted that what is a proximate cause of an injury is a question of fact, ordinarily to be decided by the jury.¹⁷² But the courts will sometimes determine the matter as a question of law,¹⁷³ especially where

West Transp. Co. v. Boston Marine Ins. Co., 41 Fed. 802. For similar criticism on "proximate cause," post, p. 494, "Contributory Negligence."

¹⁶⁹ *Sutton v. Wauwatosa*, 20 Wis. 21. But see *Jeffersonville R. Co. v. Riley*, 39 Ind. 568; *Gates v. Railroad Co.*, 39 Iowa, 45; *Milwaukee & C. R. Co. v. Kellogg*, 94 U. S. 469.

¹⁷⁰ *Insurance Co. v. Tweed*, 7 Wall. 49.

¹⁷¹ *Bosch v. Railroad Co.*, 44 Iowa, 402.

¹⁷² *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373; *Pike v. Grand-Trunk Ry. Co.*, 39 Fed. 258; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469. In determining the cause of an accident at a railroad crossing the jury may use their general knowledge as to the habits of horses and their liability to become frightened by moving trains. *State v. Maine Cent. R. Co.*, 86 Me. 309. 29 Atl. 1086; *Mechesney v. Unity Tp. Co.*, 30 Atl. 263; *Fent v. Railway Co.*, 59 Ill. 349; *Newcomb v. Boston Protective Department*, 146 Mass. 604. 16 N. E. 555, collecting cases; *Selleck v. Lake Shore & M. S. Ry. Co.*, 93 Mich. 375. 53 N. W. 556; *Smith v. Railway Co.*, L. R. 5 C. P. 98; *Lords Balliff-Jurats of Romney Marsh v. Trinity House Corp.*, L. R. 5 Exch. 204; *Jones v. Boyce*, 1 Starkie, 493; *Fent v. Toledo, etc., Co.*, 59 Ill. 349; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563; *Lane v. Atlantic Works*, 111 Mass. 139; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Hoyt v. Jeffers*, 30 Mich. 181; *Weick v. Lander*, 75 Ill. 93; *Barton v. Home Ins. Co.*, 42 Mo. 156; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *St. John v. American Mut. Fire Ins. Co.*, 11 N. Y. 516; *Union Pac. Ry. v. Novak*, 9 C. C. A. 629. 61 Fed. 573; *Aetna Ins. Co. v. Boon*, 95 U. S. 117; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. 764; *Kreuziger v. Chicago & N. W. R. Co.*, 73 Wis. 158, 40 N. W. 657; *Baltzer v. Chicago, etc., R. Co.*, 83 Wis. 459, 53 N. W. 885.

¹⁷³ *Carter v. Towne*, 103 Mass. 507; *Briggs v. Minneapolis St. Ry. Co.*, 52 Minn. 36, 53 N. W. 1019; *Prue v. New York, etc., R. Co.*, 18 R. I. 360, 27 Atl.

there is no proof of connection as cause and all the jury is given to act upon is mere conjecture.¹⁷⁴

Illustrations.

Where the damage complained of would have resulted notwithstanding defendant's conduct, such conduct is not the cause of the damage, and defendant is not liable. Therefore, where horses became frightened, and ran into a hole in the ice, near a highway, negligently left unguarded, and were drowned, it was held that their owner, though free from negligence, could not recover from the person whose duty it was to place a guard around the hole, if their speed was so great that a guard would not have prevented the casualty.¹⁷⁵ Defendant's conduct may be a necessary antecedent of the harm complained of, and may be wrongful, and still not be the juridical cause of the harm.¹⁷⁶ Conduct, to render defendant liable, must be the *causa causans* or proximate cause of the injury, and not merely a *causa sine qua non*.¹⁷⁷ In other words, a defendant is not liable when his alleged wrongful conduct was a condition, and not a cause.¹⁷⁸ Thus, delay in performance of a contract,¹⁷⁹ or wrong re-

450; *Jeffs v. Railway Co.*, 9 Utah, 374, 35 Pac. 505; *Union Pac. R. Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. 998; *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335, 37 N. E. 601.

¹⁷⁴ *Littlehale v. Osgood*, 161 Mass. 340, 37 N. E. 375 (diphtheria resulting from misrepresentation as to sanitary conditions of house).

¹⁷⁵ *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629. The law is not different where defendant's duty to guard was statutory. *Stacy v. Knickerbocker Ice Co.*, 84 Wis. 614, 54 N. W. 1091. Contrast *Union St. Ry. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012.

¹⁷⁶ Thus, an iron post used as a barber's sign stood on the sidewalk six inches from the curb. It was not fastened to the sidewalk, except by three prongs projecting from the base into holes drilled in the sidewalk. The post had stood there for 18 months, when defendant's servant negligently backed his wagon against the curb, so that the projecting end of the wagon knocked the post over upon plaintiff. It was held that the act of defendant's servant, and not the act of placing the post there, was the proximate cause of the accident. *Wolff Manuf'g Co. v. Wilson*, 152 Ill. 9, 38 N. E. 694.

¹⁷⁷ Per Kelly, C. B., in *Lords Balliff-Jurats of Romney Marsh v. Trinity House Corp.*, L. R. 5 Exch. 204, affirmed L. R. 7 Exch. 247.

¹⁷⁸ "A condition is a mechanical antecedent without causal power. A cause is the responsible voluntary agent changing the ordinary course of nature." *Cicero de Officiis*, lib. 1, cited in *Whart. Neg.* 824.

¹⁷⁹ Thus, failure to gin cotton was held the condition of its subsequent

sulting in delay, whereby damage ensues,¹⁸⁰ which but for such delay would not have occurred, is a condition, not a cause. But there is much disagreement on this point. If the natural and probable effect of the delay is to expose one to the peril from which the damage results, such delay is the proximate cause of the damage.¹⁸¹ So where one negligently exposes another to loss by an act of God, his negligence is regarded as the proximate cause of the damage.¹⁸² Such loss is not an inevitable accident.

A proximate cause need not necessarily be a sole cause,¹⁸³ nor the

burning. *James v. James*, 58 Ark. 157, 23 S. W. 1099; *Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. 696; *Martin v. St. Louis, I. M. & S. Ry. Co.*, 55 Ark. 510, 19 S. W. 314; *Deming v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. 306, 17 S. W. 89; *Missouri Pac. Ry. Co. v. Cullers*, 81 Tex. 382, 17 S. W. 19; *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. 328; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554.

¹⁸⁰ In failing to transport in time. *Reld v. Evansville & T. H. R. Co.*, 10 Ind. App. 385, 35 N. E. 703; *Railroad Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad Co.*, 13 Gray, 481; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554; *New York Lighterage & Transp. Co. v. Pennsylvania R. Co.*, 43 Fed. 172; *Hoadley v. Transportation Co.*, 115 Mass. 304.

¹⁸¹ *Railroad Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad Co.*, 13 Gray, 481; *Hoadley v. Transportation Co.*, 115 Mass. 304. And see *Jones v. Gilmore*, 91 Pa. St. 310; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6. Compare *Read v. Spaulding*, 30 N. Y. 630; *Condict v. Railway Co.*, 54 N. Y. 500; *Read v. Railroad Co.*, 60 Mo. 199; *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

¹⁸² See Hale, *Bailm.* p. 362.

¹⁸³ "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." *Lake Shore & M. S. Ry. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476. Where two fires, for one of which defendant was responsible, mingled, defendant was liable for damage thereafter ensuing. *McClellan v. St. Paul, M. & M. Ry. Co.*, 58 Minn. 104, 59 N. W. 978; *Louisville, N. A. & C. R. Co. v. Davis*, 7 Ind. App. 222, 33 N. E. 451. As applied to negligence, the rule is, where several causes combine to produce the injury complained of, defendant is not released from liability because he is not responsible for all of such causes, provided plaintiff is not guilty of contributory negligence. *Chicago, R. I. & P. Ry. Co. v. Sutton*, 11 C. C. A. 251, 63 Fed. 394; *Board of Com'rs v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Stanley v. Union Depot R. Co.*, 114 Mo. 606, 21 S. W. 832; *Herr v. City of Lebanon*, 149 Pa. St. 222, 24 Atl. 207; *Livingston v. Cox*, 6 Pa. St. 360; *Wormsдорф v. Detroit City Ry.*

nearest in time or space.¹⁸⁴ If the natural and probable effect of the wrongful conduct was to set in operation the intervening or contributing cause, such conduct is still regarded as the proximate cause,¹⁸⁵ and it is immaterial whether the intervening cause is an act of nature,¹⁸⁶ or the negligent or willful wrong of a third person.¹⁸⁷ If the damage complained of resulted from defendant's negligence, he cannot excuse himself on the ground of inevitable accident by showing that the damage would have occurred through an unavoidable cause although he had done his duty. But, if he can show that a substantial and fairly ascertainable portion of the damage which actually happened is to be attributed solely to that unavoidable cause, the liability for damage will be apportioned.¹⁸⁸

Co., 75 Mich. 472, 42 N. W. 1000; Webster v. Hudson River R. Co., 38 N. Y. 280; Eaton v. Railway Co., 11 Allen (Mass.) 500.

¹⁸⁴ Sanborn, J., in Missouri Pac. Ry. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921-925; Pullman Palace-Car Co. v. Laack, 143 Ill. 242-262, 32 N. E. 285; Union Pac. Ry. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 988; Bish. Noncont. Law, 518-684; Thomp. Neg. 981, § 10; Booth v. Boston & A. R. Co., 73 N. Y. 38; Cayzer v. Taylor, 10 Gray (Mass.) 274; Village of Carterville v. Cook, 129 Ill. 152, 22 N. E. 14; Mathews v. Tramways Co., 60 Law T. (N. S.) 47.

¹⁸⁵ See post, p. 210.

¹⁸⁶ 2 Thomp. Neg. 1067; Lords Balliff-Jurats of Romney Marsh v. Trinity House Corp., L. R. 5 Exch. 204; Ellet v. St. Louis, etc., Co., 76 Mo. 518; Piedmont & C. Ry. Co. v. McKenzie, 75 Md. 458, 24 Atl. 157; Polack v. Ploche, 35 Cal. 416, and cases cited; Chidester v. Consolidated Ditch Co., 59 Cal. 197; Rodgers v. Central Pac. R. Co., 67 Cal. 607, 8 Pac. 377; Southwestern Tel. & Tel. Co. v. Robinson, 1 C. C. A. 684, 50 Fed. 810; Dickinson v. Boyle, 17 Pick. (Mass.) 78; Salisbury v. Herchenroder, 106 Mass. 458; George v. Fisk, 82 N. H. 32; McArthur v. Sears, 21 Wend. 190; Pittsburgh City v. Grier, 22 Pa. St. 54; Scott v. Hunter, 46 Pa. St. 192; Livezey v. Philadelphia, 64 Pa. St. 106; Baltimore & O. R. Co. v. Sulphur Spring, etc., Dist., 96 Pa. St. 65; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859; Railroad Co. v. Kellogg, 94 U. S. 469.

¹⁸⁷ Lane v. Atlantic Works, 111 Mass. 136. See, also, Scott v. Shepherd, 3 Wils. 403 (squib case); Koelsch v. Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522; Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400; Murdock v. Walker, 43 Ill. App. 590; Brown v. Marshall, 47 Mich. 576, 11 N. W. 392.

¹⁸⁸ Fry, J., in Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co., 9 Ch. Div. 503, 39 Law T. (N. S.) 433, 27 Wkly. Rep. 267.

20. LEGAL RIGHTS AND WRONGS—A tort is committed only when a legal, as distinguished from a moral, right, is violated.

21. A legal right is violated only when one is damaged with respect to his person, his property, or his reputation.

The law makes no effort to enforce moral rights. It is concerned solely with legal rights and wrongs. The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort.¹⁹⁰ For every violation of legal right the law provided a remedy. *Ubi jus ibi remedium*. "It is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal."¹⁹¹ A right which any one may violate with impunity is no right at all.

¹⁹⁰ *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322, and *Mechem*, Cas. Dam. 3; *Lamb v. Stone*, 11 Pick. (Mass.) 527. "You must have, in our law, injury as well as damage." *Jessell*, M. R., in *Day v. Brownrigg*, 10 Ch. Div. 294 (304). See, also, *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Salvin v. Coal Co.*, 9 Ch. App. 705. It is an essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right. Merely that it will, however, do a man harm in his interest, is not enough. *Rogers v. Dutt*, 13 Moore, P. C. 209. "At the foundation of every tort, there must be some violation of a legal duty, and therefore some unlawful act or omission." *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 382. "The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort." *Chase*, Lead. Cas. 8; 1 *Aust. Jur.* lect. 5, "Conflict of Law and Morality"; *Rex v. Smith*, 2 Car. & P. 449. "It is not every moral and social duty the neglect of which is the ground of an action; for there are what are called, in the civil law, 'duties of imperfect obligation,' for the enforcing of which no action lies." *Lord Kenyon*, C. J., in *Pasley v. Freeman*, 3 Term R. 51, 63.

¹⁹¹ *Lord Holt*, in *Ashby v. White*, 2 *Ld. Raym.* 955. See, also, *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322. An action lies by a husband against a druggist for secretly selling laudanum to plaintiff's wife. *Hoard v. Peck*, 56 Barb. (N. Y.) 202.

Damnum absque Injuria—Injuria Sine Damno.

Governments exist for the benefit of the governed, and this benefit is afforded in the establishment and protection of rights.¹⁹² Every law exists for the purpose of establishing and protecting legal rights.¹⁹³ A legal right is a right with which the law invests one person, and in respect to which, for his benefit, a duty is imposed on another, or others, to do or refrain from doing certain acts.¹⁹⁴ Rights and duties are correlative and co-existent terms. Sometimes the right is given, and sometimes the duty is created. Whenever a right is given, the corresponding duty at once arises; whenever a duty is created, a corresponding right springs into existence. Violation of right and breach of duty are equivalent terms.¹⁹⁵

The one great fundamental right of which all men are desirous, and for the enforcement of which governments are established, is the right not to be harmed in any respect which affects their being and well-being, their happiness and immunity from pains. At common law, speaking generally, this right not to be harmed takes the form of the command not to injure another in respect to his property, his person, or his reputation.¹⁹⁶ This is the duty imposed on all members of the community, and the correlative rights arise in each member not to be injured in respect to his security of person, his security of reputation, or his security in the acquisition and enjoyment of property. Rights which cannot be referred to one of these three classes have no legal existence. For example, the invasion of another's privacy does not harm him in regard to his person, his property, or his reputation, and therefore an action for damages for the invasion of privacy by opening windows was dismissed.¹⁹⁷ Defendant, by overlooking plaintiff's property, violated no legal right of the plaintiff, because a right to privacy is

¹⁹² Cooley, Torts, 23.

¹⁹³ Holl. Jur. c. 8; Wise, Jur. 20.

¹⁹⁴ Aust. Jur. lect. 16. See, also, lect. 6.

¹⁹⁵ Pig. Torts, 10.

¹⁹⁶ Pig. Torts, 10; Cooley, Torts, 23.

¹⁹⁷ Tapling v. Jones, 11 H. L. Cas. 290. See, also, Mahan v. Brown, 13 Wend. 261; Schuyler v. Curtis, 42 N. E. 22; Id., 24 N. Y. Supp. 509; Id., 19 N. Y. Supp. 264; Id., 15 N. Y. Supp. 787. Cf. De May v. Roberts, 46 Mich. 160, 9 N. W. 146; Pollard v. Photographic Co., 40 Ch. Div. 345; Corliss v. E. W. Walker Co., 57 Fed. 434, 64 Fed. 280.

unknown. For the same reason, no action lies for causing fright or nervous terror, unaccompanied by physical harm.¹⁹⁸ A mere insult, however gross, is not actionable.¹⁹⁹

It is obvious that, even with respect to person, property, and reputation, the right not to be harmed cannot exist to its fullest extent, for, as every member of the community has the same right not to be harmed, the rights of different individuals would clash. For example, the right not to be harmed in respect to one's property includes the right to do what one likes upon his own property; but this right would very often conflict with the right of another not to be harmed in respect to his property. Each one's right not to be harmed, therefore, must be limited so as to allow of the equal exercise by others of their rights. It follows that harm may sometimes be inflicted without violating a legal right, for all harm is not prohibited. In other words, mere damage alone does not constitute a legal wrong, though it is always an essential element.²⁰⁰

It is objected that damage is not always an essential element of a legal wrong, because many wrongs are admitted to exist for which an action may be maintained though no damage has resulted. Thus, one is liable for trespass if he merely walks across another's field, though he does absolutely no damage;²⁰¹ and one who breaks a contract is liable in damages, though the breach actually results

¹⁹⁸ *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178; *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Ft. Worth & D. C. Ry. Co. v. Burton* (Tex. App.) 15 S. W. 197; *Gulf, C. & S. F. Ry. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419; *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340. Cf. *Yoakum v. Kroeger* (Tex. Civ. App.) 27 S. W. 953.

¹⁹⁹ By Code, Va. § 2897, insulting words are made actionable.

²⁰⁰ See ante, note 190. Obstruction of light and air by a structure on one's own premises is not a tort. *Guest v. Reynolds*, 68 Ill. 478; *Mahan v. Brown*, 13 Wend. 261.

²⁰¹ "So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property. and the other has no right to come there." Holt, C. J., in *Ashby v. White*, Ld. Raym. 938, 955. "There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land; * * * and this though no actual damage may result." Erle, C. J., in *Smith v. Thackerah*, L. R. 1 C. P. 564, 566. See also, *Dixon v. Clow*, 24 Wend. 188; *McAneany v. Jewett*, 10 Allen, 151; *Carter v. Wallace*, 2 Tex. 206.

in a benefit to the other party.²⁰² It is equally clear that in many cases conduct is not actionable, i. e. wrongful in law, unless followed by damage. Thus, negligence is not actionable unless it results in damage.²⁰³ It is therefore sometimes said that there are two kinds of wrongs, according as damage is or is not an essential element, and two kinds of rights corresponding, absolute rights and the right not to be harmed.²⁰⁴ No more unsatisfactory distinction could be devised. The true solution of the difficulty lies in the principle of presumption of damage. "In some cases, from the very nature of the case, the law conclusively presumes damage; that is, the plaintiff is not put to the trouble of proving it. In other cases the law does not presume damage; that is, the plaintiff is required to prove its existence. This being so, the right, as we have already pointed out, is in all cases not to be injured,—in my person, my reputation, or my property, as the case may be."²⁰⁵

²⁰² *Hibbard v. W. U. Tel. Co.*, 33 Wis. 558. For the technical breach of a bond, though without damage, nominal damages may be recovered. *State v. Reinhardt*, 31 Mo. 95. Though a trespass result in benefit, instead of damage, plaintiff is entitled to recover. *Jewett v. Whitney*, 43 Me. 242; *Jones v. Hanovan*, 55 Mo. 462; *Murphy v. Fond du Lac*, 23 Wis. 365.

²⁰³ "Mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused." *Brunsdon v. Humphrey*, 14 Q. B. Div. 141, 150. Depriving land of lateral support is not actionable, in the absence of damage. *Smith v. Thackerah*, L. R. 1 C. P. 564. One who fraudulently induces the revocation of a will is not liable to the beneficiary, because damage cannot be shown with sufficient certainty. *Hutchins v. Hutchins*, 7 Hill, 104.

²⁰⁴ Mr. Jaggard says in the original edition, at page 80: "The simple truth is that sometimes plaintiff can recover when he has not shown damage, and sometimes he cannot. On the one hand, mere damage may not constitute a cause of action, in the absence of violation of duty. On the other hand, mere violation of duty may not constitute a cause of action, in the absence of damage. There may be no such thing as a legal wrong without damage, but sometimes there cannot be a legal wrong unless there has been damage. In some cases the law presumes damage, and in some cases damages must be proved. In other words, there are two kinds of rights,—one, a simple right, the infringement of which is, in the absence of exceptional circumstances, necessarily actionable; the other is a right not to be harmed, the violation of which is actionable only when harm is suffered."

²⁰⁵ *Pig. Torts*, 126.

Accurately speaking, there is no such thing as *injuria sine damno*,²⁰⁶ because *injuria* always imports *damnum*.²⁰⁷

Damnum and Injuria.

There has been much confusion of thought in regard to the terms "damnum" and "injuria," which may be avoided by careful definition and consistent use of terms. Thus, it is said that no action lies for *damnum absque injuria*, and this, as has been seen, is true: the phrase being translated "actual damage without legal wrong." But the converse of this proposition is also stated,—that no action lies for *injuria sine damno*. Translating as before, we have the proposition that "no action lies for a legal wrong without actual damage," which is untrue. To deny the remedy is to deny the right which has been violated. Again, substituting for "legal wrong" its equivalent, we have the proposition that "no action lies for the violation of the right not to be damaged without damage," which is sheer nonsense. Damage, actual or presumed, is therefore an essential element in every legal wrong; but the mere fact that conduct results in damage is not conclusive that such conduct is wrongful in law, for, as has been seen, the law does not forbid all damage. It is necessary, therefore, to analyze human conduct to ascertain primarily whether there is any liability for damage resulting therefrom to others, and, secondly, to determine the principle upon which in some cases the law will conclusively presume damage, and in others require it to be proved.

22. For the purpose of determining what conduct is actionable, i. e. wrongful in law, conduct may be divided into three classes:

- (a) **Authorized conduct.**
- (b) **Forbidden conduct.**
- (c) **Conduct neither authorized nor forbidden.**

Authorized Conduct.

For the benefit of society at large, and to prevent a clash between rights of individuals, certain conduct is expressly authorized by law. Damage necessarily caused by such authorized conduct will not support an action. It is *damnum absque injuria*. Its infliction is not

²⁰⁶ Salmond, Jur. 169; Innes, Torts.

²⁰⁷ Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322.

a legal wrong.²⁰⁸ Conduct may be authorized either by statute or by common law.²⁰⁹ For damage resulting from the proper exercise of statutory authority no action lies.²¹⁰ Thus, annoyance from noise, smoke, and disturbances necessarily attending the operation of a railroad under its franchise, and its interference with property, is *damnum absque injuria*;²¹¹ but, if the road be operated without authority, liability attaches.²¹² So, also, where a local nuisance is authorized by statute, its maintenance is not actionable.²¹³ The common law authorizes many acts which harm another. Harm necessarily caused by the exercise of one's ordinary rights will not sup-

²⁰⁸ See post, p. 86.

²⁰⁹ Conduct may be authorized as to a particular person by his contract or consent. *Randall v. Hazelton*, 12 Allen, 412. See post, p. 116.

²¹⁰ *Managers v. Hill*, L. R. 6 App. Cas. 193; *Gaslight & Coke Co. v. Vestry of St. Mary Abbott's*, 15 Q. B. Div. 1, 5; *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529; *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. 206; *Sedalia Gaslight Co. v. Mercer*, 48 Mo. App. 644; *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 20 Atl. 169; *Durand v. Borough of Ansonia*, 57 Conn. 70, 17 Atl. 283; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705; *Bell v. Norfolk S. R. Co.*, 101 N. C. 21, 7 S. E. 467; *Jones v. St. Louis R. Co.*, 84 Mo. 151; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 148, 154; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; *Ellis v. Iowa City*, 29 Iowa, 229; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49; *Dodge v. Essex Co.*, 3 Metc. (Mass.) 380. Perhaps the best illustration of the absence of liability for damages incident to authorized act is to be found in the contrast of *Rylands v. Fletcher*, L. R. 3 H. L. 330, with the *Zemindar Case*, L. R. 1 Indian App. 364.

²¹¹ *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661; *Beldeman v. Atlantic City R. Co.* (N. J. Ch.) 19 Atl. 731.

²¹² *Jones v. Railway Co.*, L. R. 3 Q. B. 733.

²¹³ *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Hinchman v. Patterson Horse R. Co.*, 86 Am. Dec. 252; *Managers of the Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 193; *Truman v. Railway Co.*, 29 Ch. Div. 89-108, 11 App. Cas. 45; *Blacoe v. Railway*, L. R. 16 Eq. 636; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537; *Edmondson v. City of Moberly*, 98 Mo. 523, 11 S. W. 990; *Eastman v. Amoskeag Manuf'g Co.*, 82 Am. Dec. 201; *Bancroft v. City of Cambridge*, 126 Mass. 438. Where a bridge constructed in accordance with legislative authority interferes with navigation, the injury to private persons is *damnum absque injuria*. *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. 206; *Rhea v. Railroad Co.*, 50 Fed. 20; *U. S. v. North Bloomfield Gravel Min. Co.*, 53 Fed. 627.

port an action. For example, damage consequent upon competition in trade is not actionable, for every one is authorized to engage in business;²¹⁴ nor does liability attach to the ordinary use of one's property.²¹⁵ Private persons are sometimes authorized to exercise disciplinary powers. Thus, the master of a ship is not liable for force used in maintaining order and discipline,²¹⁶ and parents or persons in loco parentis may enforce discipline by moderate chastisement or detention.²¹⁷ "The rights of necessity are a part of the law."²¹⁸ There is no liability for acts or omissions as to which a person has no option.²¹⁹ Thus, when a highway becomes ob-

²¹⁴ Gloucester Grammar School Case (1410-11), Y. B. 11 Hen. IV. p. 47, pl. 21; *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598. See, also, *Chasemore v. Richards*, 7 H. L. Cas. 349; *Ocean Grove v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168.

²¹⁵ A blacksmith may operate his forge, and a merchant his store, without liability, although neighbors thereby suffer annoyance. *Doellner v. Tynan*, 38 How. Prac. (N. S.) 182; *Smith v. Ingersoll Drill Co.*, 7 Misc. Rep. 374, 27 N. Y. Supp. 907, collecting cases; *McGuire v. Bloomingdale*, 8 Misc. Rep. 478, 29 N. Y. Supp. 580.

²¹⁶ *The Agincourt*, 1 Hagg. Adm. 271-274; *Bangs v. Little*, 1 Ware, 506, Fed. Cas. No. 839; *U. S. v. Alden*, 1 Spr. 95, Fed. Cas. No. 14,427; *Cushman v. Ryan*, 1 Story, 91, Fed. Cas. No. 3,515; *Turner's Case*, 1 Ware, 83, Fed. Cas. No. 14,248; *Wilson v. The Mary*, Gilp. 31, Fed. Cas. No. 17,823; *Michaelson v. Denison*, 3 Day (Conn.) 294; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Sampson v. Smith*, 15 Mass. 365; *Flemming v. Ball*, 1 Bay (S. C.) 3; *Mathews v. Terry*, 10 Conn. 455; *State v. Board of Education*, 63 Wis. 234, 23 N. W. 102; *Allen v. Hallet*, 1 Abb. Adm. 573; *Payne v. Allen*, 1 Spr. 304, Fed. Cas. No. 10,855; *Schelter v. York*, Crabbe, 449, Fed. Cas. No. 12,446; *Jay v. Almy*, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; *Butler v. McLellan*, 1 Ware, 219, Fed. Cas. No. 2,242; *Buddington v. Smith*, 13 Conn. 334.

²¹⁷ *Cooley*, Torts, 197; *Johnson v. State*, 2 Humph. 283; *Winterburn v. Brooks*, 2 Car. & K. 16.

²¹⁸ *Respublica v. Sparhawk*, 1 Dall. 357-362; *Mouse's Case*, 12 Coke, 63; *Burton v. McClellan*, 3 Ill. 434; *American Print Works v. Lawrence*, 23 N. J. Law, 604.

²¹⁹ The destruction of property for the public good is authorized by necessity. *Case of Prerogative*, 12 Coke, 13; *Maleverer v. Spinke*, Dyer, 36b; *McDonald v. City of Red Wing*, 13 Minn. 38 (Gil. 25); *Bowditch v. Boston*, 101 U. S. 16; *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277; *Hyde Park v. Gay*, 120 Mass. 590; *Surocco v. Geary*, 3 Cal. 70; *American Print Works v. Lawrence*, 23 N. J. Law, 590; *Beach v. Trudgain*, 2 Grat. (Va.) 219; *Hale v. Lawrence*, 23 N. J. Law, 590. And see *Arundel v. McCulloch*, 10 Mass. 70; *Campbell v. Race*, 7 Cush. (Mass.) 408; *Mouse's Case*.

structed and impassable, a traveler is authorized to go on adjoining lands to avoid the obstruction, and hence he is not liable for trespass.²²⁰ The law also authorizes one to repel unlawful or dangerous force by force, in the defense of person, property, or possession, whenever there is a real or an apparent necessity, honestly believed to be real, for the defense. For example, where one acting in self-defense accidentally shoots an innocent bystander, he is not liable if guilty of no negligence.²²¹ In all these cases, the act being expressly declared to be lawful, the harm necessarily resulting is *damnum absque injuria*, or "damage without legal wrong." It is the price men pay for the benefits of society.

Forbidden Conduct.

For reasons essentially of public policy, to prevent breaches of the peace, and because its necessary or probable effect is damage to some one, the law absolutely forbids certain conduct. A duty is imposed on all members of the community to refrain from such conduct, and the correlative right to have them refrain arises on the part of those for whose benefit the duty is created. These rights correspond to "absolute rights" in the classification of those writers

12 Coke, 63; *Respublica v. Sparhawk*, 1 Dall. 357; *Taylor v. Plymouth*, 8 Metc. (Mass.) 462. As to statutory changes, see *Fisher v. Boston*, 104 Mass. 87. "There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses, or raising bulwarks for the preservation of the kingdom against the king's enemies. * * * This is a case to which the maxim applies, 'Salus populi suprema lex est.'" Butler, J., in *Governor, etc., British Cast Plate Manufacturers v. Meredith*, 4 Term R. 794, 797. See, also, 12 Coke, 12, 13; *Dyer*, 60b; *Russell v. Mayor, etc., of City of New York*, 2 Denio, 461. And see the opinion of Butler, J., in *Taylor v. Whitehead*, 2 Doug. 745, 749. Peril to human life may constitute such necessity as will excuse what would otherwise be wrongdoing. *Metropolitan Asylum Dist. v. Hill*, L. R. 6 App. Cas. 193-205; *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Clark v. Famous Shoe & Clothing Co.*, 16 Mo. App. 463.

²²⁰ *Donahoe v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 560; *Bullard v. Harrison*, 4 Maule & S. 387-393; *Campbell v. Race*, 7 Cush. (Mass.) 408; *Burd. Lead. Cas.* 136. As to ways of necessity, see *Bish. Noncont. Law*, 872; *Vossen v. Dautel*, 116 Mo. 379,*22 S. W. 734; *Camp v. Whitman* (N. J. Ch.) 26 Atl. 917; *Lankins v. Terwilliger*, 22 Or. 97, 29 Pac. 268.

²²¹ *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132; *Scott v. Shepherd*, 2 W. Bl. 892. As to damage caused in trying to avoid missile, see *Vallo v. United States Exp. Co.*, 147 Pa. St. 404, 23 Atl. 594.

who divide rights into absolute rights and rights not to be harmed.²²² From their violation, the law conclusively presumes that some damage has resulted.²²³ In this class of cases therefore, it is sufficient to simply prove the conduct, proof of damage being relevant with respect to the amount of compensation recoverable, but not with respect to the existence of the cause of action. In all other cases the law indulges in no presumption, but leaves the party complaining of a wrong to prove it by showing the presence of both its essential elements,—the conduct itself and the resulting damage. Cases of defamation afford a good illustration of the principle under discussion. Damage is such a probable consequence of certain slanderous and libelous statements that the law absolutely forbids them. These statements are said to be actionable *per se*. Proof of their utterance, without more, is sufficient to sustain an action,

²²² It will be convenient to sometimes use the term "absolute rights" to designate the rights corresponding to forbidden conduct. There is no objection to the term if it is understood that it merely stands for specialized instances of the right to immunity from harm.

²²³ "Every injury imports a damage, though it does not cost the party one farthing." Lord Holt, in *Ashby v. White*, 2 Ld. Raym. 955. "I can very well understand that no action lies in case where there is *damnum absque injuria*; that is, where there is damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said (in a legal sense) that an action will not lie even in a case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it, and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." Justice Story, in *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322, and *Mechem*, Cas. Dam. 3. When it is understood that the right violated is in all cases a right to immunity from harm, it will readily be conceded that "every injury imports damage in the nature of it"; but the phrase does not tell us a great deal, for the fact remains that in many cases damage must be proved to show an injury (wrong). The learned judge evidently referred to those absolute or specialized rights which are correlative to a prohibition. "Actual, perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable." Per Park. B., in *Embrey v. Owen*, 6 Exch. 353; *McLeod v. Boulton*, 3 U. C. Q. B. 84; *Whip-*

for the law presumes the damage.²²⁴ Other false and defamatory statements may cause harm, but the harm is not such a probable or necessary consequence. The law therefore does not specifically forbid such statements, and, to maintain an action therefor, both the words and the resulting damage must be proved.²²⁵ Assaults,²²⁶ trespasses, and the like are illustrations of forbidden conduct. To enumerate every case in which damages will be presumed "would be to recapitulate the whole corpus juris."²²⁷

Same—Public Wrongs.

Where a public duty is created,—that is, where conduct is prohibited for the benefit of the community at large,—an individual cannot maintain an action for its breach. The remedy is by in-

ple v. Cumberland Manuf'g Co., 2 Story, 661, Fed. Cas. No. 17,516; Bagby v. Harris, 9 Ala. 173; Paul v. Slason, 22 Vt. 231; Cory v. Silcox, 6 Ind. 39; Little v. Stanback, 63 N. C. 285. For violation of a statute forbidding restaurant keepers to discriminate against colored people, damages may be recovered. Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718.

²²⁴ Henkle v. Schaub, 94 Mich. 542, 54 N. W. 293; Smith v. Sun Printing & Pub. Ass'n, 5 C. C. A. 91, 55 Fed. 240; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362; Newell, Defam. 181. To accuse one in print of lying is actionable per se. Riley v. Lee, 88 Ky. 603, 11 S. W. 713; Prosser v. Callis, 117 Ind. 105, 19 N. E. 735. So to call a man a "skunk," Massuere v. Dickens, 70 Wis. 83, 35 N. W. 349; or a "swindler," Janson v. Stuart, 1 Term. R. 748; Smith v. Stewart, 41 Minn. 7, 42 N. W. 595.

²²⁵ Ratcliffe v. Evans [1892] 2 Q. B. 524; Daniel v. New York News Pub. Co., 67 Hun, 649, 21 N. Y. Supp. 862; Bradstreet Co. v. Gill, 72 Tex. 119, 9 S. W. 753; Brown v. Durham, 3 Tex. Civ. App. 244, 22 S. W. 868; Haney Manuf'g Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073. Defamatory words that harm no one, even if false, are not actionable; as where they were uttered in the presence of the slandered person only, Sheffill v. Van Deusen, 13 Gray, 304; or in a foreign language, which was not understood. Klene v. Ruff, 1 Iowa, 482, Hurdick, Lead. Cas. Torts, 215; Warmouth v. Cramer, 3 Wend. 395; Townsh. Sland. & L. (4th Ed.) 94; 1 Starkie, Sland. & L. 361. Defamatory words spoken by a lunatic, whose insanity was obvious, or known to all the hearers, are not actionable. Dickinson v. Barber, 9 Mass. 224-227; Bryant v. Jackson, 6 Humph. 199; Yeates v. Reed, 4 Blackf. 463. So, also, of words spoken or understood as a jest. Donoghue v. Hayes, 265. See, also, Broderick v. James, 3 Daly, 481; Myers v. Dresden, 40 Iowa, 660; Van Rensselaer v. Dole, 1 Johns. Cas. 279; Chase v. Whitlock, 3 Hill, 139; Sheffill v. Van Deusen, 13 Gray, 304.

²²⁶ I. De S. v. W. De S., Lib. Ass. fol. 99, pl. 60.

²²⁷ Sedg. Dam. § 98.

dictment on behalf of the public. The law gives no private remedy for anything but a private wrong.²²⁸ The reason is one of public policy, and is well stated by Lord Coke in regard to public nuisances:²²⁹ "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action, for, by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause." Where, however, the breach of a public duty results in special and peculiar damage to an individual, he may maintain an action, for all the elements of an actionable wrong are present, and no principle of public policy prevents.²³⁰ It devolves upon plaintiff to bring himself within the exception. He must allege and prove that he has suffered special and peculiar damage. The law will not presume it.²³¹ The right to maintain the action does not depend on the number injured, but upon the personal character of the injury.²³² "If many persons receive a private injury by a public nuisance, every one shall have his action."²³³

Conduct neither Authorized nor Forbidden.

Between the two classes of conduct expressly authorized by law and conduct expressly forbidden, there is a third class, comprising

²²⁸ 3 Bl. Comm. 219; 4 Bl. Comm. 167; Broom, Leg. Max. 206.

²²⁹ Williams' Case, 5 Coke, 72. See, also, Iveson v. Moore, 1 Salk. 15.

²³⁰ "Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in the highway, and hurts his horse, or sustains a personal injury, then he may bring his action." Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276.

²³¹ Winterbottom v. Derby, L. R. 2 Exch. 316.

²³² Cooley, Torts, 102; Henly v. Mayor, etc., of Lyme, 5 Bing. 91, 3 Barn. & Adol. 77; Nicholl v. Allen, 1 Best & S. 936; McKinnon v. Penson, 8 Exch. 319; King v. Richards, 8 Term R. 634.

²³³ Per Holt, C. J., in Ashby v. White, Ld. Raym. 938, 955. See, also, Williams' Case, 5 Coke, 73; Co. Litt. 56a; Corley v. Lancaster, 81 Ky. 171. See post, p. 436.

the great mass of human actions, in which the conduct is neither expressly authorized nor forbidden, and in which liability for consequences must be referred directly to the great fundamental right of immunity from harm. This class corresponds to the second division in the classification of rights into absolute rights and rights not to be harmed. In it, damage is never presumed, but must be proved, or the violation of a right is not shown. The law, however, has not undertaken the impossible task of insuring against all harm. It recognizes the fact that unfortunate accidents will occur, for which no one is to blame, and wisely and justly, in most cases, leaves him to bear the loss upon whom it has fallen. The law, however, has pursued no consistent theory of liability.²³⁴ Liability is recognized in three classes of cases: (1) Where the conduct was malicious; (2) where the conduct was negligent; and (3) where it was done at peril. In the first two classes, liability attaches on the theory of culpability. In the third class, it attaches on the theory that there is a duty to insure safety. Each class will be considered briefly.

Same—Malicious Conduct.

It is a legal wrong to do willful harm to another without just cause or excuse.²³⁵ If there exists a right of immunity from harm, it is clear that the negative duty of not doing willful harm must also exist, subject to necessary exceptions. Thus, the prosecution in good faith of a groundless action is not a legal wrong to defend-

²³⁴ Jagg. Torts, 48. O. W. Holmes, Jr., in 7 Am. Law Rev. 652; Holmes, Com. Law, 79; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391.

²³⁵ Bowen, L. J., in Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. 598, [1892] App. Cas. 25, citing Bromage v. Prosser, 4 Barn. & C. 247; Capital, etc., Bank v. Henty, L. R. 7 App. Cas. 74. This statement avoids the common principles, for example, as in 1 Add. c. 1, § 9, p. 36 (40). "But every malicious act wrongful in itself in the eyes of the law, if it causes hurt or damage to another, is a tort, and may be the foundation of an action." An act wrongful in itself producing damage is naturally actionable. Generally, Jagg. Torts, 555; Clerk & L. Torts, 16; Green v. Button, 2 Crompt., M. & R. 707; Cattle v. Stockton Waterworks Co., L. R. 10 Q. B. 43. An interesting article on the right to so maliciously exercise one's legal rights as to cause damage to others, and the remedy therefor, 58 J. P. 814.

ant, though he is put to large expense;²³⁶ but, if the action is prosecuted maliciously and without probable cause, it is a legal wrong.²³⁷ Fraud, deceit, conspiracy, strikes, boycotts, malicious interference with contract, and the like, are examples of conduct wrongful in law, because of malice and resulting damage. If either is absent, the wrong is not complete.*

Same—Negligent Conduct.

The law imposes the general duty of exercising due care to avoid harm. Whenever damage results from a failure to exercise such care, a legal wrong is committed. Negligence which does not result in damage is not wrongful in law. "Mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused."²³⁸

Same—Conduct at Peril.

As has been seen, damages may sometimes be recovered where the conduct causing the harm was neither negligent nor malicious. The duty to avoid harm is regarded as absolute. Acts complained of as nuisances are perhaps the best illustration of acts done at peril. Liability is not at all dependent upon either care or motive.²³⁹ Ab-

²³⁶ *Woodmandle v. Logan*, 2 N. J. Law, 86; *Muldoon v. Rickey*, 103 Pa. St. 110; *Eberly v. Rupp*, 90 Pa. St. 259.

²³⁷ In an action for malicious prosecution, malice must be alleged and proved. *Saxon v. Castle*, 6 Adol. & El. 652; *Page v. Wiple*, 3 East, 314; *Vanduzor v. Linderman*, 10 Johns. 106. *Emerson v. Cochran*, 111 Pa. St. 619, 4 Atl. 498. Malice is a distinct issue. *Smith v. Maben*, 42 Minn. 516, 44 N. W. 792; *Cooper v. Hart*, 147 Pa. St. 594, 23 Atl. 833. The burden of proving malice is on the plaintiff. 2 Greenl. Ev. § 449; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Mitchell v. Jenkins*, 5 Barn. & Adol. 588; *Whalley v. Pepper*, 7 Car. & P. 506; *Walker v. Cruikshank*, 2 Hill, 297; *Melvin v. Chancy* (Tex. Civ. App.) 28 S. W. 241; *Barber v. Scott* (Iowa) 60 N. W. 497; *Welsh v. Cheek* (N. C.) 20 S. E. 460; *Womack v. Fudikar*, 47 La. Ann. 33, 16 South. 645.

* See post, c. 9, p. 327.

²³⁸ *Brunsdon v. Humphrey*, 14 Q. B. Div. 141, 150.

²³⁹ *Upjohn v. Board*, 46 Mich. 542, 9 N. W. 845; *Cairncross v. Village of Pewaukee*, 86 Wis. 181, 56 N. W. 648; *Lamming v. Galusha*, 135 N. Y. 230, 31 N. E. 1024. The use of ordinary skill and caution in the construction of work (as draining surface water) will not protect from liability, if there has been a failure to provide against any damage which might have been foreseen.

absolute liability is also recognized in a class of cases of which *Fletcher v. Rylands*²⁴⁰ is a type. In these cases liability for damage is dependent neither upon malice nor negligence, but upon the ownership, use, custody, or control of some dangerous instrumentality.²⁴¹ Critical modern investigation is questioning and denying the doctrine of absolute liability, and many exceptions are recognized by the courts.²⁴²

Recapitulation.

The substance of the foregoing may be summed up as follows: All legal rights are rights not to be harmed. A legal wrong is committed whenever one is harmed by conduct which is either forbidden, negligent, malicious, or done at peril. Rights correlative to forbidden conduct are merely specialized instances of the right not to be harmed, and may be called simple or absolute rights. From their violation the law will presume damage, and consequently it need not be proved in order to show a legal wrong. Where the conduct is not forbidden, but is negligent, malicious, or done at peril, damage must be proved in order to show a legal wrong; for the only right involved is the fundamental right to immunity from harm, and, of course, a violation of this right can be shown only by showing harm. Where the conduct was neither forbidden, negligent, malicious, nor done at peril, but damage nevertheless results, it is simply an unhappy accident, unless it was expressly authorized. In either

Staton v. Norfolk & C. R. Co., 111 N. C. 278, 16 S. E. 181. Cf. *Gulf, C. & S. F. Ry. Co. v. Steele* (Tex. Civ. App.) 26 S. W. 926. Contributory negligence is ordinarily no defense to a nuisance. *Philadelphia & R. R. Co. v. Smith*, 12 C. C. A. 384, 64 Fed. 679. Cf. *Willis v. City of Perry* (Iowa) 60 N. W. 727.

²⁴⁰ L. R. 1 Exch. 265. Cf. *Losee v. Buchanan*, 51 N. Y. 476.

²⁴¹ Things dangerous in themselves may be regarded from the point of view of nuisance, negligence, or breach of duty to insure safety. *Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co.*, 42 Fed. 273-281. The opinion of Brown, J., in this case is eminently clear and able. *Van Norden v. Robinson*, 45 Hun, 567. See, also, post, p. 456.

²⁴² Plg. Torts, c. 7; *Brown v. Kendall*, 6 Cush. 292; *Harvey v. Dunlop*, Hill & D. 193; *Nitro-Glycerine Case*, 15 Wall. 524; *Lansing v. Stone*, 37 Barb. 15; *Center v. Finney*, 17 Barb. 94; *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132; *Dygert v. Bradley*, 8 Wend. 470; 1 Hill, Torts, c. 5, § 9; 2 Greenl. Ev. 85. See, also, *Holmes v. Mather*, L. R. 10 Exch. 261; *Stanley v. Powell* [1891] Q. B. Div. 86.

case, no legal wrong is committed. The loss is *damnum absque injuria*.

23. The wrongfulness of the conduct complained of as a cause of action in tort is determined

(a) By the *lex loci*, and not by the *lex fori*, and ordinarily

(b) By the state of facts existing at the commencement of the action.

Lex Loci not Lex Fori.

The English rule as to the act itself is that, where torts are committed abroad, recovery can be had in English courts only when the act is a tort by the law of the country where it was committed,²⁴³ and also by the English law.²⁴⁴ In other words the act must be wrongful by both laws.²⁴⁵ In the United States it is generally recognized that damages recoverable in tort are controlled by the law of the place where the injury occurred, and, in case of contract, where the agreement was made.²⁴⁶ Accordingly, if a servant be injured by the negligence of the master in Iowa, he can sue in Minnesota, and his rights of action are determined by the Iowa laws, including the statutory law as to damages in case of death by wrongful act.²⁴⁷ The action may be maintained in another state without proof

²⁴³ *Phillips v. Eyre*, L. R. 6 Q. B. 1; *The M. Moxham*, 1 Prob. Div. 107; *The Halley*, L. R. 2 P. C. 193.

²⁴⁴ As between English and French actions, see *Peruvian Guano Co. v. Bockwoldt* (1882) 23 Ch. Div. 225. As between England and Holland in proceedings, see *The Christiansborg* (1885) 10 Prob. Div. 141. As between English and American courts, see *Hyman v. Helm* (1883) 24 Ch. Div. 531; *Mutrie v. Binney* (1887) 35 Ch. Div. 614.

²⁴⁵ *Pol. Torts*, § 176; *Whitaker v. Forbes*, 1 C. P. Div. 51.

²⁴⁶ *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978; *Watson v. Railroad Co.*, 91 Ga. 222, 18 S. E. 306; *Helton v. Railway Co.*, 97 Ala. 275, 12 South. 276; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 11 South. 803; *Torrance v. Third Nat. Bank*, 70 Hun, 44, 23 N. Y. Supp. 1073; *Alexander v. Pennsylvania Co.*, 48 Ohio, 623, 30 N. E. 69.

²⁴⁷ *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11, 16 N. W. 413; *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978. The law is determined, not by the place where death occurred, but by the place where

of *lex loci*; the action on tort is a transitory action. A cause of action founded upon a statute of one state conferring the right to recover damages for an injury resulting in death may be enforced in a court of the United States sitting in another state if it is not inconsistent with statutes or public policy of the state in which the right of action is sought to be enforced.²⁴⁸

Cause of Action as to Time.

"Every man shall recover according to the right which he hath at the time of bringing the action." It was accordingly held in a case of trover by five, one of whom died before verdict, and the others of whom obtained a verdict for the plaintiff, that granting judgment for the four was error.²⁴⁹ So far as regards the effect of death of parties, however, upon an action in tort, the matter is now largely statutory.²⁵⁰ The more important question arises in connection with the definition of the right; that is to say, what is plaintiff's cause of action. If the injury is a direct invasion of an absolute right, then the cause of action is complete upon defendant's wrongful conduct. Damages follow thereupon immediately as a necessary consequence.²⁵¹ Where, however, the law will not presume damage, and plaintiff's cause of action is complete only when damages conforming to legal requirements have been actually suffered, then the cause of action is complete upon the happening of such damage.²⁵² There is no inconsistency between this proposition and the further one that in the same proceeding a plaintiff can recover for both damages which arose prior to the commencement of his action and subsequent thereto. New damage may create new causes of action,²⁵³ but damages for one cause of action are indivisible.²⁵⁴

the injury was received. *De Harn v. Mexican Nat. Ry. Co.*, 86 Tex. 68, 23 S. W. 381.

²⁴⁸ *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905.

²⁴⁹ *Wedgewood v. Baily*, T. Raym. 463.

²⁵⁰ "Death by Wrongful Act," post, p. 183 et seq.

²⁵¹ *Mitchell v. Colliery Co.*, 10 Q. B. Div. 457, 52 Law J. Q. B. Div. 394.

²⁵² *Bonomi v. Backhouse*, 96 E. C. L. 653. Mr. Justice Brewer has stated the principle with great clearness. "Where the original act itself is no invasion of the plaintiff's rights, then there is no cause of action unless such act

²⁵³ "Damages," post, p. 223.

²⁵⁴ "Damages," post, p. 222.

24. GENERAL SUMMARY.

Tort Defined.

Mr. Pollock has summarized much of the substance of the foregoing discussion in the following remarkable (and elaborate) definition of a tort:

"A tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to harm suffered by a determinate person in the following ways:

"(a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of (*malicious conduct*).

"(b) It may be an act in itself contrary to law, or an omission of specific legal duty which causes harm not intended by the person so acting or omitting (*forbidden conduct*).

"(c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence, have foreseen and prevented (*negligent conduct*).

"(d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or with limits, to avoid or prevent (*conduct at peril*).

"A special duty of this kind may be (1) absolute; (2) limited to answering for harm which is assignable to negligence." ²⁵⁵

Elements Essential to Recovery in Tort.

Recovery can be had in tort, it would seem, only when the following elements of a cause of action are shown:

(a) Parties.

(1) Plaintiff not disentitled by his own wrong or consent.

(2) Defendant not personally irresponsible when personal responsibility is essential, and not within admitted exceptions or exemptions.

has caused damages; and the right of action dates from that time. On the other hand, * * * where the original act is unlawful, and an invasion of the plaintiff's right, the cause of action dates from that act, and a new cause does not arise from new damages resulting therefrom." *Kansas Pac. Ry. Co. v. Muhlman*, 17 Kan. 224.

²⁵⁵ Pol. Torts, p. 19. The italics are the author's.

(b) A legal duty recognized by trial court as owed by defendant to plaintiff.

(c) A violation of that duty in fact by defendant.

(d) Damage to plaintiff conforming to the standard of the law as the proximate result, except when, on proof of mere violation of duty, the law infers damages.

CHAPTER II.

VARIATIONS IN NORMAL RIGHT TO SUE.

- 25. Variations Based on Privilege of Actor.
- 26. Public Acts—Acts of State.
- 27-28. Conduct of Legislators.
- 29-31. Conduct of Judicial Officers.
- 32-35. Conduct of Executive Officers.
- 36. Private Acts.
- 37. Exercise of Statutory Rights.
- 38. Exercise of Common Law Rights.
- 39. Variations Based on Status.
- 40. Insane Persons.
- 41-43. Infants.
- 44. Drunkards.
- 45. Convicts—Alien Enemies.
- 46. Private Corporations.
- 47-48. Municipal and Quasi Municipal Corporations.
- 49. Corporations, Not Municipal, Engaged in Public Work.
- 50. Variations Based on Conduct of Plaintiff.
- 51-52. Wrongdoing by Plaintiff.
- 53. Consent.

VARIATIONS BASED ON PRIVILEGE OF ACTOR.

25. Under this head will be considered

(a) Public acts, including

- (1) Acts of state;**
- (2) Conduct of legislators;**
- (3) Conduct of judicial and quasi judicial officers;**
- (4) Conduct of executive officers.**

(b) Private acts, authorized

- (1) By statute;**
- (2) By common law.**

PUBLIC ACTS—ACTS OF STATE.

26. The state, except by its own clearly-manifested consent, is not liable to individuals for injuries it may cause. This exemption applies alike to

- (a) The United States government,**
- (b) The governments of the various states, and**
- (c) To foreign sovereignties.**

Exemption in General.

The exemption of the state from liability for all torts is based upon its sovereign character. The duties the state performs are all public, and it cannot be held liable for any imperfections in their performance. Its exemption does not rest on the ground that there are no means provided for remedy against the state, but that there is no obligation on the part of the state for which an action lies.¹ "The king can do no wrong."² "The government," said Mr. Justice Story, "does not undertake to guaranty to any person the fidelity of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments, difficulties, and losses, which would be subversive of the public interest."³ The exemption, however, applies only to suits against the state. So far as concerns torts committed in the performance of ministerial duties, and generally as to acts injurious to the persons and property of others,⁴ it is no defense that private individuals who are parties defendant acted as officers of the government; nor does this defeat jurisdiction.⁵

¹ *Murdock Parlor-Grate Co. v. Com.*, 152 Mass. 28-31, 24 N. E. 854.

² *Bl. Comm.* 246, 4 *Bl. Comm.* 33. But see *Buron v. Denman*, 2 Exch. 167. Elaborate discussion and dissenting opinion in *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240; *Langford v. U. S.*, 101 U. S. 341.

³ *Beers v. State*, 20 How. 527; *Gibbons v. U. S.*, 8 Wall. 269; *Galbes v. Girard*, 46 Fed. 500; *Dox v. Postmaster General*, 1 Pet. 318; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Whiteside v. U. S.*, 93 U. S. 247-251; *Hart v. U. S.*, 95 U. S. 316-318; *Moffat v. U. S.*, 112 U. S. 24-31, 5 Sup. Ct. 10.

⁴ Thus, trespass may lie against the officers of the United States army. *Mitchell v. Harmony*, 13 How. 115; *Bates v. Clark*, 95 U. S. 204. So an officer of the United States is liable for infringement of a patent used under government order. *Head v. Porter*, 48 Fed. 481.

⁵ Opinion of Mr. Justice Miller in *Cunningham v. Macon & B. R. Co.*, 109

Consent to Liability.

The state may, however, consent to be impleaded in court, and to be held liable in damages for tortious conduct, by unqualified appearance in a judicial proceeding brought against it, or by legislative act or resolution.⁶ Such consent is limited to claims and classes of claims within the language of the statute manifesting it expressly, or by clear implication.⁷ Thus, merely giving a court jurisdiction of all charges against a state, whether in law or equity, does not create an obligation to pay damages resulting from torts of officers or agents in the performance of their duties.⁸ The consent of the state may be withdrawn without impairing the obligation of a contract.⁹

Exemption of the United States.

The courts of justice of the United States "are established, not only to decide upon controverted rights of the citizens, as against each other, but also upon rights in controversy between them and the government."¹⁰ The United States has not, however, consented to be sued generally for torts committed by its officers;¹¹ but special acts have referred certain tort cases to federal courts and to the court of claims.¹² Thus, the government of the nation may be held

U. S. 446, 3 Sup. Ct. 292, 609, as to the three classes of judicial proceedings which affect a state, but do not constitute a suit against it. As to what is and what is not a suit against the state, see 30 Am. Law Reg. 1, 3.

⁶ Curran v. Arkansas, 15 How. 304, 308; Hartman v. Greenhow, 102 U. S. 672; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962; Coleman v. State, 134 N. Y. 564, 31 N. E. 902; State v. Torinus, 26 Minn. 1, 49 N. W. 259.

⁷ Lewis v. State, 96 N. Y. 71-74; Sipple v. State, 99 N. Y. 284, 1 N. E. 892, and 3 N. E. 657; Hyatt v. State, 121 N. Y. 665, 24 N. E. 1093; Locke v. State, 140 N. Y. 480, 35 N. E. 1076; Troy & G. R. Co. v. Com., 127 Mass. 43, 46; Coulterville & Y. Turnpike Co. v. State, 104 Cal. 321, 37 Pac. 1035.

⁸ Murdock Parlor-Grate Co. v. Com., 152 Mass. 28, 33, 24 N. E. 854; Stone v. State, 138 N. Y. 124, 130, 33 N. E. 733.

⁹ Beers v. State, 20 How. 527; Railroad Co. v. Alabama, 101 U. S. 832; In re Ayers, 123 U. S. 443-505, 8 Sup. Ct. 164.

¹⁰ U. S. v. Lee, 106 U. S. 196, 220, 1 Sup. Ct. 240.

¹¹ Gibbons v. U. S., 8 Wall. 269; Hill v. U. S., 149 U. S. 593, 13 Sup. Ct. 1011; German Bank of Memphis v. U. S., 148 U. S. 573, 13 Sup. Ct. 702; Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85.

¹² Act Feb. 24, 1855, c. 122 (10 Stat. 612); Act March 3, 1863, c. 92 (12 Stat. 765); Act March 17, 1866, c. 19 (14 Stat. 9).

liable in trespass for damages to the extent of the value of occupancy of land by it.¹³

Exemption of the Various States.

Under the original constitution, the various states composing the Union could be brought before the national courts by citizens of other states.¹⁴ This was changed by the eleventh amendment. So that at the present time no state can be sued in any court, without its own consent, except by the United States, a sister state, or a foreign government.¹⁵ Each state determines, accordingly, the extent to which it may be sued in its own courts,¹⁶ and, in the absence of statutory authority extending the jurisdiction of courts to the determination of claims against the state, an appeal to the legislature is the only remedy of the citizen against it.¹⁷

Exemption of Foreign Powers.

The same exemption applies to foreign powers. "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any

¹³ Johnson's Case, 2 Ct. Cl. 391; Pope v. U. S., 26 Ct. Cl. 11. Et vide Roettinger v. U. S., Id. 391. As to Indian depredation claims: Hyne v. U. S., 27 Ct. Cl. 113; Mitchell v. U. S., Id. 316; Falk v. U. S., Id. 321. Action by a state against the United States. State of New York v. U. S., 26 Ct. Cl. 467. So as to collision resulting from negligence charged in the management of public vessels. Sampson v. U. S., 12 Ct. Cl. 480; Walton v. U. S., 24 Ct. Cl. 372.

¹⁴ Chisholm v. Georgia, 2 Dall. 419.

¹⁵ Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504; North Carolina v. Temple, 134 U. S. 22, 10 Sup. Ct. 509; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699. Et cf. In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785; U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488. Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728.

¹⁶ Treasurer v. Cleary, 3 Rich. (S. C.) 372; Coleman v. State, 134 N. Y. 564, 31 N. E. 902 (trespass of public contractor, consent of state); Hosner v. De Young, 1 Tex. 764; Williamsport & A. R. Co. v. Com., 33 Pa. St. 288, 291.

¹⁷ Stone v. State, 188 N. Y. 124, 33 N. E. 733; Chapman v. State, 104 Cal. 690, 38 Pac. 457.

state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.”¹⁸

SAME—CONDUCT OF LEGISLATORS.

27. Members of the legislature are exempt from liability for anything said or done by them, as representatives, in the functions of their office, whether regular or irregular, and against the rule of the legislative bodies.

28. The agents or servants of the legislature, however, may be held personally responsible for conduct pursuant to the direction of the legislature, when such authority is not legal.

Freedom of speech and action is commonly derived from constitutional provisions, or bills of rights. The privilege is said to be rather the privilege of an individual member than of the house, as an organized body. The members are therefore entitled to it, even as against the will of the house. It is immaterial whether or not the conduct in question is according to the rules of the house. The representatives are not liable for words uttered in the execution of their official duties, although spoken maliciously. The exemption applies to a member while sitting on a committee in a lobby or in a convention of the two houses out of the representative chamber.¹⁹

While, on principles peculiar to itself, the English parliament has power to punish for contempt, the house of representatives of the United States has not. Accordingly, where its sergeant at arms, in accordance with instructions of the house, imprisoned the plaintiff for contempt as a witness, the order of the house afforded the

¹⁸ The Parlement Belge, 5 Prob. Div. 214; Duke of Brunswick v. King of Hanover, 6 Beav. 1, 2 H. L. Cas. 1; Manning v. State of Nicaragua, 1 How. Prac. (N. Y.) 517; U. S. v. Trumbull, 48 Fed. 94; Foreign consuls: The Marie, 49 Fed. 286; Williams v. The Welhaven, 55 Fed. 80.

¹⁹ Coffin v. Coffin, 4 Mass. 1; State v. Burnham, 9 N. H. 34; Perkins v. Mitchell, 31 Barb. 461-468.

sergeant at arms no protection in an action by the plaintiff for false imprisonment. The members of congress, however, were exempt from liability, because of the provision of the constitution that for any speech or debate in either house the members shall not be questioned in any other place.²⁰

SAME—CONDUCT OF JUDICIAL OFFICERS.

29. No judge can be held personally liable to any one, in a civil action, for conduct, even if malicious and corrupt, occurring in the exercise of jurisdiction clearly conferred.

EXCEPTION—The exemption does not apply to conduct occurring in the performance of ministerial, as distinguished from judicial, duty, and perhaps not to quasi judicial officers, when they act maliciously and corruptly. The duty is ministerial when the law governing its discharge prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion.

Conduct within Jurisdiction.

The exemption of judicial officers from liability in tort for conduct within jurisdiction clearly conferred is well illustrated in *Stewart v. Cooley*.²¹ Here a judge was charged with having conspired with the clerk of his court, willfully and maliciously, to cause the plaintiff to be charged with, and arrested and imprisoned for, the crime of perjury. The judge was held to be exempt. Even if, in the exercise of such judicial functions, the judge acts, not only wrongfully, but with a corrupt motive, he is not civilly liable.²² Thus,

²⁰ *Kilbourn v. Thompson*, 103 U. S. 168, overruling and rejecting some of the reasoning in *Anderson v. Dunn*, 6 Wheat. 204.

²¹ 23 Minn. 347. And see *Fray v. Blackburn*, 3 Best & S. 576; *Kemp v. Neville*, 10 C. B. (N. S.) 523; *Floyd v. Barker*, 12 Coke, 23-25; *Turpen v. Booth*, 56 Cal. 65, 69; *Weaver v. Devendorf*, 3 Denio, 117, 120; *Reld v. Hood*, 2 Nott & McC. (S. C.) 168; *Stone v. Graves*, 8 Mo. 148.

²² *Irion v. Lewis*, 56 Ala. 190; *Kress v. State*, 65 Ind. 106. But see *Knell*

it has been held that an action will not lie against a justice of the peace for issuing a writ in favor of a third person upon a false claim against the plaintiff, and secreting and destroying the writ after service thereof, and refusing to enter it, or to allow the defendant therein his costs.²³ Quasi judicial public officers, as township trustees, arbitrators, etc.,²⁴ are not liable in damages for erroneous interpretation or application of the law.²⁵ If they act fraudulently or maliciously, the exemption has been held to end.²⁶ Thus, members of a school board may be held liable for maliciously dismissing a teacher, but not for such acts as the expulsion of children in good faith.²⁷ An attorney for a party to an action referred by the court is liable to the adverse party for conspiracy with one of the arbitrators to obtain an unjust award in favor of his client, although the arbitrator is not liable.²⁸

Judicial Officers de Jure or de Facto.

To entitle a person to claim exemption as a judicial officer, it is not necessary that he should be such officer de jure. It is sufficient if he be de facto. The exemption applies, when the act is within the jurisdiction, alike to the highest judges in the land,²⁹ and to the most veritable Dogberry.³⁰ Members of the naval and military

v. *Briscoe*, 49 Md. 414; *Hitch v. Lambright*, 66 Ga. 228; *Garfield v. Douglass*, 22 Ill. 100.

²³ *Raymond v. Bolles*, 11 Cush. 315; *Pratt v. Gardner*, 2 Cush. 63; *Weaver v. Devendorf*, 3 Denio, 117.

²⁴ *Stevenson v. Watson*, 4 C. P. Div. 148; *Pappa v. Rose*, L. R. 7 C. P. 525; *Jones v. Brown*, 54 Iowa, 74, 6 N. W. 140.

²⁵ *State v. Hastings*, 37 Neb. 96, 55 N. W. 774. Cf. *Ward v. Freeman*, 2 Ir. Com. Law, 460.

²⁶ *Stewart v. Southard*, 17 Ohio, 402.

²⁷ *Burton v. Fulton*, 49 Pa. St. 151; *Donahoe v. Richards*, 38 Me. 379; *Stewart v. Southard*, 17 Ohio, 402; *Billings v. Lafferty*, 31 Ill. 318; *Reed v. Conway*, 20 Mo. 22. Judges of election not liable for honest mistakes. *Bevard v. Hoffman*, 18 Md. 479. Cf. *Ward v. Freeman*, 2 Ir. Com. Law, 460.

²⁸ *Hoosac Tunnel Co. v. O'Brien*, 137 Mass. 424. Nor a coroner: *Thomas v. Churton*, 2 Best & S. 475.

²⁹ *Bradley v. Fisher*, 13 Wall. 335; *Dicas v. Lord Brougham*, 6 Car. & P. 249; *Fray v. Blackburn*, 3 Best & S. 576; *Lange v. Benedict*, 73 N. Y. 12; *Londogan v. Hammer*, 30 Iowa, 508; *Booth v. Kurrus*, 55 N. J. Law, 370, 26 Atl. 1013; *Banister v. Wakeman*, 64 Vt. 203, 23 Atl. 585 (collecting cases).

³⁰ *White v. Morse*, 139 Mass. 162, 20 N. E. 539; *In re Cooper*, 32 Vt. 253;

court-martials are not liable for their conduct while acting in such capacity.³¹ It appears that coroners³² and mayors of cities³³ are judges, in this sense. The exemption extends to grand and petit jurors in discharge of their duties,³⁴ and generally to all officers exercising judicial functions.³⁵

Reason.

The reason for exemption has been very clearly stated by Mr. Justice Brewer:³⁶ "Nothing is more important, in any country, than an independent judiciary; and nowhere is it more important, so absolutely essential, as under a popular government. No man can be a good judge who does not feel perfectly free to follow the dictates of his own judgment, wheresoever it may lead him, and, in a country where popular clamor is apt to sway the multitude, nothing is more important than that the judges should be kept as independent as possible; and it is the universal experience, and the single voice of the law books, that one thing essential to their independence is that they should not be exposed to a private action for damages for anything they may do as judges."

Weaver v. Devendorf, 3 Denio, 117 (collecting cases); **Marks v. Sullivan**, 9 Utah, 12, 33 Pac. 224. Judge municipal court: **Rudd v. Darling**, 64 Vt. 456, 25 Atl. 479. City recorder: **Brunner v. Downs**, 63 Hun, 626, 17 N. Y. Supp. 633.

³¹ **Dawkins v. Lord Rokeby**, L. R. 7 H. L. 744; **Dawkins v. Prince Edward of Saxe-Weimar**, 1 Q. B. Div. 490.

³² **Garnett v. Ferrand**, 6 Barn. & C. 619.

³³ **Boutte v. Emmer**, 43 La. Ann. 980, 9 South. 921; **State v. Wolever**, 127 Ind. 306, 318, 26 N. E. 762.

³⁴ **Hunter v. Mathis**, 40 Ind. 356; **Turpen v. Booth**, 56 Cal. 65.

³⁵ **Weaver v. Devendorf**, 3 Denio, 117; **Van Steenbergh v. Bigelow**, 3 Wend. 42; **Jones v. Brown**, 54 Iowa, 74, 6 N. W. 140; **Freeman v. Cornwall**, 10 Johns. 470; **Edwards v. Ferguson**, 73 Mo. 686; **Billings v. Lafferty**, 31 Ill. 318; **Donahoe v. Richards**, 38 Me. 379; **Shoemaker v. Nesbit**, 2 Rawle (Pa.) 201; **Wall v. Trumbull**, 16 Mich. 228; **Wasson v. Mitchell**, 18 Iowa, 153; **Pike v. Megoun**, 44 Mo. 491; **Walker v. Hallock**, 32 Ind. 239; **Downing v. McFadden**, 18 Pa. St. 334; **Johnston v. District of Columbia**, 118 U. S. 19, 6 Sup. Ct. 923.

³⁶ **Cooke v. Bangs**, 31 Fed. 640, 641. See, also, **Bradley v. Fisher**, 13 Wall. 335-347.

30. No judge of the courts of record, having supreme or general jurisdiction, can be held liable, even for corrupt and malicious conduct, with respect to matters which are in excess of, but not in the complete absence of, jurisdiction. Under such circumstances, however, a judge of an inferior court, not of record, has been held personally liable.

A leading case illustrative of this principle is *Bradley v. Fisher*.³⁷ In that trial, during a recess, Bradley, one of the attorneys, insulted Fisher, the presiding judge, and threatened him with chastisement. Thereupon, the judge entered an order striking Bradley's name from the roll of attorneys practicing in the court. In the subsequent proceeding brought to test the validity of this act of the judge, the court held that while, before a lawyer should be disbarred, he was entitled to notice, still judges of courts of record, of supreme or general jurisdiction, are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done fraudulently and corruptly. The judge was accordingly held not to be liable.

As to courts of inferior jurisdiction, not only must the jurisdiction be made to appear,³⁸ but it has been held that they are liable for acting maliciously and fraudulently in matters in excess of their jurisdiction.³⁹ The tendency of the courts is to extend to judges of inferior courts the same immunity from liability to a civil action as is given to judges of courts of record; and this is specially true where the error of the judge is in determining whether or not his authority extends over the matter at issue.⁴⁰

³⁷ 13 Wall. 335, 357; *State v. Wolever*, 127 Ind. 306, 26 N. E. 762; *Pickett v. Wallace*, 57 Cal. 555; *Ackerley v. Parkinson*, 3 Maule & S. 411. Compare *Thompson v. Whipple*, 54 Ark. 203, 15 S. W. 604.

³⁸ *Wickes v. Clutterbuck*, 2 Bing. 483; *Hill v. Pride*, 4 Call. 107; *Newman v. Earl of Hardwicke*, 8 Adol. & E. 123.

³⁹ *Rutherford v. Holmes*, 66 N. Y. 368; *Stearns v. Miller*, 25 Vt. 20; *Vaughn v. Congdon*, 56 Vt. 111. But note dissension in opinions: *De Courcey v. Cox*, 94 Cal. 665, 30 Pac. 95; *Truesdell v. Combs*, 33 Ohio St. 186; *Bigelow v. Stearns*, 19 Johns. 38; *Piper v. Pearson*, 2 Gray (Mass.) 120.

⁴⁰ *Allec v. Reece*, 39 Fed. 341; *Cooke v. Bangs*, *supra*; *Grove v. Van Duyn*, 44 N. J. Law, 654, 658-660; *Dusy v. Helm*, 59 Cal. 188; *Rains v. Simpson*, 50

31. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped, and for its exercise, when the want of jurisdiction is known to the judge, no excuse is permissible.

Where there is a want of jurisdiction over the persons, or over the subject-matter of the cause of action, it is the same as if there were no court,—*coram non judice*.⁴¹ Thus, if a justice of the peace were to arrest for murder, or a probate judge for a civil offense, there would be such an absence—as distinguished from mere excess—of jurisdiction as would attach liability.⁴²

Exemption as to Ministerial Acts.

The exemption from liability of judges applies only to acts which are judicial, hence discretionary in their nature. Where, however, the act is ministerial, and, in its performance, does not involve the exercise of judgment, judges are liable for their wrongful, malicious, or corrupt acts, as are individuals. Mere neglect of persons having judicial functions to perform also ministerial acts, where required, attaches liability.⁴³

An act is ministerial when it is performed in a prescribed manner, in obedience to the law, without regard to, or the exercise of, the judgment of the individual as to the propriety of the acts done.⁴⁴ Thus, if a justice, in making up his docket, fraudulently and mali-

Tex. 495, 501; *McCall v. Cohen*, 16 S. O. 445; *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623; *Burnham v. Stevens*, 33 N. H. 247; *Downer v. Lent*, 6 Cal. 94; *Jordan v. Hanson*, 49 N. H. 199; *Clark v. Holdridge*, 58 Barb. 61; *Bocock v. Cochran*, 32 Hun, 521; *Clark v. Spicer*, 6 Kan. 440. See 15 Am. Law Rev. 441; *Lange v. Benedict*, 29 Am. Rep. 80; *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477.

⁴¹ *Marshalsea Case*, 10 Coke, 68b, approved in *Taylor v. Clemson*, 2 Adol. & E. (N. S.) 978. See *Mitchell v. Foster*, 12 Adol. & E. 472; *Houlden v. Smith*, 14 Adol. & E. (N. S.) 841; *Piper v. Pearson*, 2 Gray, 120; *Van Slyke v. Insurance Co.*, 39 Wis. 394.

⁴² Dicta in *Grumon v. Raymond*, 1 Conn. 40. And see *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477; *Calder v. Halket*, 3 Moore, P. C. 28; *Patzack v. Von Gerichten*, 10 Mo. App. 424.

⁴³ *Ferguson v. Earl of Kinnoull*, 9 Clark & F. 251; *Noxon v. Hill*, 2 Allen (Mass.) 215; *Jones v. Werden*, 12 Cush. (Mass.) 133; *Way v. Townsend*, 4 Allen (Mass.) 114; *Heriot's Hospital v. Ross*, 12 Clark & F. 506, 518.

⁴⁴ *Pennington v. Streight*, 54 Ind. 376; *Grider v. Tally*, 77 Ala. 422.

ciously fails to mention an appeal, his failure is not a mistake of judgment, and he is personally liable.⁴⁵

SAME—CONDUCT OF EXECUTIVE OFFICERS.

32. Private individuals cannot recover damages resulting from conduct violating a duty owed solely to the public and imposed by the state on its executive officers, instrumentalities, or agents. Such damages are the results of a purely public wrong, and therefore are not subject to private action.

33. Damages may, however, be recovered against executive public officers

(a) For conduct in the course of performance of public duties, provided

(1) Such conduct violates a duty to an individual, in the performance of which he has a particular interest, even though that duty be also owed to the public; and

(2) The complainant suffers some special individual wrong, as distinguished from the wrong done the community generally.

(b) For unauthorized conduct in the course of performance of official duty.

Violation of Purely Public Duties.

In so far as a public officer or institution executes the authority or performs the functions of the government, the exemption of the state for wrong applies to him. Under "municipal corporations,"⁴⁶ it will be seen that, when a city exercises governmental functions, it is not liable for torts; when it exercises private functions, it is. Many governmental agencies share even a more absolute exemption. Thus, an action will not lie against a state house of refuge for an assault

⁴⁵ *Horne v. Pudil*, 88 Iowa, 533, 55 N. W. 485; *Brooks v. St. John*, 25 Hun, 540; *Peters v. Land*, 5 Blackf. (Ind.) 12; *Tompkins v. Sands*, 8 Wend. (N. Y.) 462; *Place v. Taylor*, 22 Ohio St. 317; *Rochester White-Lead Co. v. City of Rochester*, 3 N. Y. 463.

⁴⁶ See post, p. 105.

on an inmate by one of its officers.⁴⁷ A purely charitable corporation established by the state is not liable for the negligent or malicious acts of its servants.⁴⁸ Similarly, persons directed by law to establish a penitentiary are not liable to one injured while working thereon.⁴⁹ And, generally, boards of trustees, and their individual members, exercising governmental functions, are agents of the state, and exempt from liability in their performance of public duties.⁵⁰ Thus, the trustees of the Brooklyn Bridge are not liable for error in judgment, in not providing a sufficient police force on the bridge.⁵¹ The same exemption applies to school boards⁵² and school directors.⁵³

Same—The Exemption Applies Generally to Persons Engaged in Judicial Proceedings.

The exemption from liability for torts extends to all persons connected as essential parts of judicial proceedings, as well as to judges. The purpose of the law, to promote justice by removing the restraint on the freedom of human action which would be imposed by fear of civil responsibility for conduct connected with judicial proceedings, would not be fulfilled if the exemption from such liability were confined to judges only. On the contrary, it extends to the officers of the court, the parties to the proceeding, and the witnesses who testify therein, and even to the persons who published a fair report thereof.⁵⁴

⁴⁷ *Perry v. House of Refuge*, 63 Md. 20.

⁴⁸ *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 24 S. W. 1065. And see *Farnham v. Pierce*, 141 Mass. 203, 6 N. E. 830. A collection of cases will be found in *Boyd v. Insurance Patrol*, 113 Pa. St. 269-276, 6 Atl. 536.

⁴⁹ *Alamango v. Supervisors*, 25 Hun, 551. But see *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075.

⁵⁰ *Hall v. Smith*, 2 Bing. 156; *Chamberlain v. Clayton*, 56 Iowa, 331, 9 N. W. 237; *Walsh v. Trustees*, 96 N. Y. 427; *Jordon v. Hayne*, 36 Iowa, 9, 15; *Nugent v. Levee Com'rs*, 58 Miss. 197.

⁵¹ *Walsh v. Trustees*, 96 N. Y. 427. And see *Walsh v. Mayor, etc.*, 107 N. Y. 220, 13 N. E. 911.

⁵² *Post*, p. 105, "Municipal Corporations"; *Donovan v. McAlpin*, 85 N. Y. 185.

⁵³ *Boardman v. Hayne*, 29 Iowa, 339; *Smith v. District Township of Knox*, 42 Iowa, 522.

⁵⁴ *Jerom & Knight's Case*, 1 Leon. 107; *Dawling v. Wenman*, 2 Show.

Violation of Private Duties.

In order that a person may recover damages, he must show, not only negligence in the performance of a public duty, but he must also show a breach of particular duty owing to him. Therefore, where the duty is entirely to the public at large, and not to any specific individual, he cannot recover.⁵⁶ The duty may, however, be both to the public and to the individual. In such cases he can recover alike for the nonfeasance, misfeasance, or malfeasance of the public officer.⁵⁷

Special Injury.

The party complaining must show special injury peculiar to himself. I "consider the point beyond all dispute," said Spencer, C. J., "that, for a misbehavior of an officer in his office, * * * no one can maintain an action against him, unless he can show a special and particular damage to himself."⁵⁸ He therefore held that no action lay against the managers of a public lottery, at the suit of a dealer in lottery tickets who had purchased a large number of tickets to be sold at a profit on the ground that, by the negligence and improper conduct of the defendants, public confidence was destroyed, and the plaintiff was unable to sell his tickets.⁵⁹

446; *Damport v. Sympton*, Cro. Eliz. 520, *Owen*, 158; *Eyres v. Sedgewicke*, Cro. Jac. 601, 2 Rolle, 197; *Wimberly v. Thompson*, Noy, 6; *Harding v. Bodman*, Hut. 11; *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491; *Bostwick v. Lewis*, 2 Day (Conn.) 447; *Grove v. Bradenburg*, 7 Blackf. (Ind.) 239; *Dunlap v. Glidden*, 31 Me. 435; *Severance v. Judkins*, 73 Me. 376-379; *Garing v. Fraser*, 76 Me. 37; *Phelps v. Stearns*, 4 Gray (Mass.) 105; *Curtis v. Fairbanks*, 16 N. H. 542; *Smith v. Lewis*, 3 Johns. (N. Y.) 157; *Cunningham v. Brown*, 18 Vt. 123; *Bell v. Senneff*, 83 Ill. 122. One who suborns witnesses to swear falsely to defamatory statements is liable therefor. *Rice v. Coolidge*, 121 Mass. 393.

⁵⁶ Whart. Neg. § 284; Shear. & R. Neg. §§ 167-177; *Kahl v. Love*, 37 N. J. Law, 5; *Hall v. Smith*, 2 Bing. 156.

⁵⁷ *Rowning v. Goodchild*, 2 W. Bl. 906; *Amy v. Supervisors*, 11 Wall. 136; *Lane v. Cotton*, 1 Salk. 17; *Kendall v. U. S.*, 12 Pet. 524; *Reed v. Conway*, 20 Mo. 22; *Keith v. Howard*, 24 Pick. (Mass.) 292; Mech. Pub. Off. (collecting cases). And see *Bennett v. Whitney*, 94 N. Y. 302.

⁵⁸ *Butler v. Kent*, 19 Johns. (N. Y.) 223.

⁵⁹ *Wright v. Defrees*, 8 Ind. 208; *Eslava v. Jones*, 83 Ala. 139; *Harrington v. Ward*, 9 Mass. 251; *Strong v. Campbell*, 11 Barb. 135.

Liability of Sheriffs, Constables, etc.

Sheriffs, constables,⁶¹ and similar officers are exempt from liability for damages caused by execution of process whenever it appears that the writ is regular on its face, and that it was issued by a court of competent jurisdiction as respects the subject-matter, although it does not disclose the want of jurisdiction in respect to the person, nor show whether the court ever acquired any jurisdiction over the person.⁶² But for conduct under a defective writ, or for an unauthorized act, such public officers become liable to individuals.⁶³ Thus, they may become liable for making arrest under a defective warrant,⁶⁴ or for unlawfully breaking into a house to make a levy,⁶⁵ or for failure to sell property levied on,⁶⁶ to execute⁶⁷ or return,⁶⁸ or for making a false return⁶⁹ of, process and execution,⁷⁰ or for negligence in making sale,⁷¹ or for selling exempt

⁶¹ A constable will be protected in levying execution under a void judgment, unless the levy was made with intent to oppress the execution defendant. *Thompson v. Jackson* (Iowa) 61 N. W. 1004. Cf. *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919.

⁶² *Orr v. Box*, 22 Minn. 485; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170; *Campbell v. Sherman*, 35 Wis. 103; *Chase v. Ingalls*, 97 Mass. 524.

⁶³ A collection of authorities as to suits on official bonds for trespasses, or unauthorized acts of officers done *colore officii*. *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200, and 21 Lawy. Rep. Ann. 738, and note.

⁶⁴ Post, p. 248, "False Imprisonment."

⁶⁵ *Welsh v. Wilson*, 34 Minn. 92, 24 N. W. 327; *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996.

⁶⁶ *Valentine v. Kwilecki*, 89 Ga. 98, 14 S. E. 878.

⁶⁷ *Hawkeye Lumber Co. v. Diddy*, 84 Iowa, 634, 51 N. W. 2; *Bachelder v. Chaves* (N. M.) 25 Pac. 783; *Steele v. Crabtree*, 40 Neb. 420, 58 N. W. 1022; *Mathis v. Carpenter*, 95 Ala. 156, 10 South. 341; *Denson v. Ham* (Tex. App.) 16 S. W. 182; *Crosson v. Olson*, 47 Minn. 27, 49 N. W. 406; *Zelinsky v. Price*, 8 Wash. 256, 36 Pac. 28; *De Yampert v. Johnson*, 54 Ark. 165, 15 S. W. 363; *Bittman v. Mize*, 45 Kan. 450, 25 Pac. 875; *Rogers v. Marlboro Co.*, 32 S. C. 555, 11 S. E. 383; *Pierce v. Jackson*, 65 N. H. 121, 18 Atl. 319.

⁶⁸ *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105; *Atkinson v. Heer*, 44 Ark. 174, followed in *Wilson v. Young*, 58 Ark. 593, 25 S. W. 870.

⁶⁹ *Blair v. Flack*, 62 Hun (N. Y.) 509, 17 N. Y. Supp. 64.

⁷⁰ *Turner v. Page*, 111 N. C. 291, 16 S. E. 174; *Boyd v. Teague*, 111 N. C. 246, 16 S. E. 338; *Hood v. Blair*, 95 Ala. 629, 10 South. 671.

⁷¹ *Cramer v. Oppenstein*, 16 Colo. 504, 27 Pac. 716; *Russell v. Grimes*, 31 Neb. 784, 48 N. W. 905.

property.⁷² The sheriff is liable where he intentionally takes property not covered by his writ. In such cases he is a trespasser ab initio, and is liable for all consequences of an unlawful entry and seizure.⁷³ The sheriff is, in general, liable for wrongful seizure,⁷⁴ and may be jointly liable with his deputy,⁷⁵ or with plaintiff in the action.⁷⁶ For reasons of public policy, the sheriff is absolutely liable for the forthcoming of all property levied on by him, unless deprived of it by the act of God, sudden accident, or the public enemy. He is therefore liable if it is stolen.⁷⁷ He may, however, not be liable for goods destroyed by fire.⁷⁸ A sheriff is liable in other cases upon similar principles.

Liability of Other Officers.

Registers of deeds, abstract clerks,⁷⁹ clerks of court,⁸⁰ notaries public,⁸¹ and other similar officers are liable for negligence or willfulness in the performance of their duties.⁸²

⁷² Kriesel v. Eddy, 37 Neb. 63, 55 N. W. 224.

⁷³ Grunberg v. Grant, 3 Misc. Rep. 230, 22 N. Y. Supp. 747. Et vide Williams v. Mercer, 139 Mass. 141, 29 N. E. 540.

⁷⁴ Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495; McAllaster v. Bailey, 127 N. Y. 583, 28 N. E. 591; Rogers v. McDowell, 134 Pa. St. 424, 21 Atl. 166; Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906; Brown v. Mosher, 83 Me. 111; Taylor v. Moore, 63 Vt. 60, 21 Atl. 919; Palmer v. McMaster, 10 Mont. 390, 25 Pac. 1056; Whitney v. Preston, 29 Neb. 243, 45 N. W. 619; Boulware v. Craddock, 30 Cal. 190.

⁷⁵ Frankhouser v. Cannon, 50 Kan. 621, 32 Pac. 379; Luck v. Zapp, 1 Tex. Civ. App. 528, 21 S. W. 418; State v. Dalton, 69 Miss. 611, 10 South. 578.

⁷⁶ Jones v. Lamon, 92 Ga. 529, 18 S. E. 423.

⁷⁷ Hartleib v. McLane's Adm'r, 44 Pa. St. 510; Bond v. Ward, 7 Mass. 123.

⁷⁸ State v. Dalton, 69 Miss. 611, 10 South. 578.

⁷⁹ Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39; Houseman v. Association, 81 Pa. St. 256, 262; Savings Bank v. Ward, 100 U. S. 195; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; McCaraher v. Com., 5 Watts & S. (Pa.) 21; Morange v. Mix, 44 N. Y. 315; Chase v. Heaney, 70 Ill. 268; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633; Mallory v. Ferguson, 50 Kan.

⁸⁰ Thouron v. Railway Co., 90 Tenn. 609, 18 S. W. 256; Benjamin v. Shea, 83 Iowa, 392, 49 N. W. 989; Toncray v. Dodge Co., 33 Neb. 802, 51 N. W. 235; People v. Bartels, 138 Ill. 322, 27 N. E. 1091; Maxwell v. Pike, 2 Me. 8; Rosenthal v. Davenport, 38 Minn. 543, 38 N. W. 618.

⁸¹ See note 81 on following page.

⁸² See note 82 on following page.

Unauthorized Acts.

Whenever a person sued sets up as a defense that he was an officer of the government acting under color of law, he must show that the law authorized the act to be done, and that he acted in good faith.⁸³ Where his authority fails his protection is gone. Thus, an agent of the United States in the service of the coast survey, doing injury to land, will be liable in an action of tort unless such entry and injury were reasonably necessary for the coast survey.⁸⁴ So where a board of state commissioners, disregarding the requirements of the city charter that all work for the city should be let by contract, undertook to repair a bridge themselves, they were held liable for an injury caused to a person by the negligence of employes engaged in doing the work, although the city was not.⁸⁵ Even where the authority of the officer fails because the law under which he acted, even in good faith, has been declared unconstitutional,⁸⁶ he is liable. So, also, where the court whose direction he obeyed had no jurisdiction.⁸⁷ A defective writ is no defense to an officer serving it, or an arrest under it.⁸⁸

685, 32 Pac. 410; *Sinclair v. Slawson*, 44 Mich. 123, 6 N. W. 207; *Lyman v. Edgerton*, 29 Vt. 305; *Chatham v. Bradford*, 50 Ga. 327; *First Nat. Bank v. Clements*, 87 Iowa, 542, 54 N. W. 197. As to action on bond: *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917.

⁸³ *Commercial Bank v. Varnum*, 49 N. Y. 269; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *People v. Butler*, 74 Mich. 643, 42 N. W. 273; *Curtiss v. Colby*, 39 Mich. 456. Compare with *Com. v. Haines*, 97 Pa. St. 228; *State v. Meyer*, 2 Mo. App. 413; *Com. v. Haines*, 97 Pa. St. 228; *Henderson v. Smith*, 26 W. Va. 829; *Scotten v. Fegan*, 62 Iowa, 236, 17 N. W. 491; *Brigham v. Bussey*, 26 La. Ann. 676; *Fox v. Thibault*, 33 La. Ann. 33; *Schmitt v. Drouet*, 42 La. Ann. 1064, 8 South. 396.

⁸⁴ Election officers held absolutely liable for refusing to receive vote. *Lincoln v. Hapgood*, 11 Mass. 350.

⁸⁵ *Tweed's Case*, 16 Wall. 504.

⁸⁶ *Orr v. Quimby*, 54 N. H. 590.

⁸⁷ *Robinson v. Rohr*, 73 Wis. 436, 40 N. W. 668; *Bailey v. Mayor, etc.*, 3 Hill, 531; *Martin v. Mayor, etc.*, 1 Hill, 545; *Donovan v. McAlpin*, 85 N. Y. 185; *Fitzpatrick v. Slocum*, 89 N. Y. 358.

⁸⁸ *Mech. Pub. Off.* p. 445, § 662, collecting cases.

⁸⁹ *Clark v. Woods*, 2 Exch. 395.

⁹⁰ *Spaulding v. Overmire*, 40 Neb. 21, 58 N. W. 736; *post*, p. 248, "False Imprisonment." But a constable may serve a writ regular on its face, but

34. A public officer not ministerial is not responsible for the tortious conduct of an official subordinate, unless in some way personal fault is attributed to him, as where he has

- (a) Been guilty of negligence; or**
- (b) Directed or participated in the wrong.**

35. Ministerial officers are, in general, liable for wrongs caused by deputies, as distinguished from private servants.

Nonministerial Officers.

The exemption of a public nonministerial officer from liability for the acts of his subordinates is an extension and application of the principles governing the exemption of the officers themselves. Where the subordinates perform a governmental function, they are not the representatives of their superior officer, but of the state. The exemption thus rests on the same consideration of public policy which exempts the superior officers themselves.⁸⁹ The postmaster general, his deputies, local postmasters, and their assistants perform public functions, and, while their wrongdoing in an official capacity may inflict damage on innocent persons, the exemption from liability of the state extends to them all alike.⁹⁰ The same exemption from liability for the negligence of subordinates applies to public trustees and commissioners.⁹¹ Where, however, the officer has been in some way

issued on a void judgment. *Cornell v. Barnes*, 7 Hill (N. Y.) 35. Cf. *O'Shaughnessy v. Baxter*, 121 Mass. 515.

⁸⁹ *City of Richmond v. Long*, 17 Grat. (Va.) 375.

⁹⁰ *Keenan v. Southworth*, 110 Mass. 474; *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Lord Le Despencer*, Cowp. 754; *Dunlop v. Munroe*, 7 Cranch. 242; *Schroyer v. Lynch*, 8 Watts (Pa.) 453; *Bishop v. Williamson*, 11 Me. 495; *Bolan v. Williamson*, 1 Brev. (S. C.) 181; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632. A postmaster may be liable for not acting judiciously in charging letter postage on a newspaper. *Teall v. Felton*, 1 N. Y. 537. Contractors for carrying mail are not liable for acts of subordinates. *Sawyer v. Corse*, 17 Grat. (Va.) 230; *Foster v. Metts*, 55 Miss. 77. But see, contra, *Conwell v. Voorhees*, 13 Ohio, 523; *Hutchins v. Brackett*, 22 N. H. 252.

⁹¹ *Holliday v. Parish of St. Leonard*, 11 C. B. (N. S.) 192; *Duncan v. Findlater*, 6 Clark & F. 894; *Humphreys v. Mears*, 1 Man. & R. 187; *Hall v. Smith*, 2 Bing. 156; *Harris v. Baker*, 4 Maule & S. 27; *Sutton v. Clarke*, 6 Taunt.

guilty of negligence, as in the employment or retention of unfit or improper persons,⁹² or failure in his duty to require of them due qualifications for office, as to take the oath prescribed by law,⁹³ or to execute a proper bond,⁹⁴ or where he carelessly conducts the business of his office,⁹⁵ he may be held liable as for his own wrong.⁹⁶ He is also liable where he has in any wise participated in the wrong. Where a public officer is sued for the tort of his personal employé, he may be held liable as any other master.⁹⁷

Ministerial Officers.

While the employé of a ministerial officer may not be a private servant, there is no more reason for exempting such officer for the conduct of his deputies than for his own conduct. Accordingly, wherever recovery could be had against the executive for his own act, it can be had against him for the act of his subordinate.⁹⁸ Thus, a superintendent of repairs on the canals of the state, though an agent of the state, is personally liable for damages sustained by an individual through the negligence of workmen engaged in making such repairs.⁹⁹ A constable is civilly liable for the trespass of his deputy *colore officii*.¹⁰⁰ So, a deputy sheriff is acting within the scope of his employment in engaging a keeper to aid to keep safely property which he had levied on under warrants of attachment, and the sheriff is liable for his acts.¹⁰¹

29, 34; *Donovan v. McAlpin*, 85 N. Y. 185; *Walsh v. Trustees*, 96 N. Y. 427; *County Com'rs v. Duvall*, 54 Md. 350.

⁹² *Wiggins v. Hathaway*, 6 Barb. 632.

⁹³ *Bishop v. Williamson*, 11 Me. 495; *Bolan v. Williamson*, 1 Brev. (S. C.) 181; *Sawyer v. Corse*, 17 Grat. (Va.) 230.

⁹⁴ *Wasson v. Mitchell*, 18 Iowa, 153; *Hubbard v. Switzer*, 47 Iowa, 681.

⁹⁵ *Dunlop v. Munroe*, 7 Cranch, 242; *Ford v. Parker*, 4 Ohio St. 576.

⁹⁶ *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499.

⁹⁷ *Wilson v. Peverly*, 2 N. H. 548; *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499.

⁹⁸ *Mech. Pub. Off.* §§ 797-801; *Bassett v. Fish*, 75 N. Y. 303; *Cook v. Palmer*, 6 Barn. & C. 739; *Hazard v. Israel*, 1 Bin. (Pa.) 240; *Knowlton v. Bartlett*, 1 Pick. (Mass.) 271.

⁹⁹ *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 249.

¹⁰⁰ *Frizzell v. Duffer*, 58 Ark. 612, 25 S. W. 1111.

¹⁰¹ *Foster v. Rhinehart* (City Ct. Brook.) 11 N. Y. Supp. 629.

PRIVATE ACTS.

36. Where there is no excess or abuse of authority, no action lies to recover damages incident to an act authorized

- (a) By statute, or municipal ordinance
- (b) By common law.

SAME—EXERCISE OF STATUTORY RIGHTS.

37. No action lies for damages incident to acts authorized by statute.

No action lies for damage to property where such damage is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is authorized. In other words, for damages resulting from the proper execution of statutory authority, no action lies.¹⁰² Thus, the legislature may grant the right to maintain a local nuisance. Damages which would result from the maintenance of such nuisances are incident to the authorized act and give no cause of action.¹⁰³ The annoyance from noise, smoke, and disturbances necessarily attending the operation of a railroad,¹⁰⁴

¹⁰² *Managers of Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 193; *Gaslight & Coke Co. v. Vestry of St. Mary Abbott's*, 15 Q. B. Div. 1, 5; *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529; *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. 206; *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Durand v. Borough of Ansonia*, 57 Conn. 70, 17 Atl. 283; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705; *Bell v. Norfolk S. R. Co.*, 101 N. C. 21, 7 S. E. 467; *Jones v. St. Louis R. Co.*, 84 Mo. 151; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 148, 154; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; *Ellis v. Iowa City*, 29 Iowa, 229; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49; *Dodge v. Essex Co. Com'rs*, 3 Metc. (Mass.) 380; *Rylands v. Fletcher*, L. R. 3 H. L. 330.

¹⁰³ A charter to operate a fertilizing company is a sufficient license until revoked. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659. One blasting in a harbor, in performance of a contract with the United States, is not liable for damages to houses, unless he is negligent. *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 31 N. E. 328.

¹⁰⁴ Post, p. 439, "Legalized Nuisance"; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552-567.

and its interference with property,¹⁰⁵ are *damnum absque injuria*, in the absence of statutory compensation,¹⁰⁶ whereas if there be no statutory authority there is ordinary liability.¹⁰⁷ And on the other hand, where the legislative authority binds those acting under it to make good specified damage, they are bound to make it good under all circumstances, and without any exceptions, even as to inevitable accident, just as if they had entered into an express contract of insurance with the person suffering the damage.¹⁰⁸ Municipal corporations are not liable to landowners for consequential damages arising out of work done in pursuance of legislative authority, unless civil responsibility is created by statute or the constitution.¹⁰⁹ They are not ordinarily held responsible for damages resulting from establishing and changing the grade of streets, if reasonable care is exercised in performing the work.¹¹⁰ Municipal license may be a defense for damage in conduct otherwise actionable. Abutting owners using streets or roads in accordance with municipal regulations are not, in the absence of negligence, liable for injury resulting from such use.¹¹¹ The necessary physical consequences of public authority may justify a trespass.

¹⁰⁵ If an engine, carefully handled, frightens horses, the charter of a corporation affords legal justification. *Rex v. Pease*, 4 Barn. & Adol. 30; *Bese-man v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Thompson v. Railroad Co.*, 51 N. J. Law, 42, 15 Atl. 833. Cf. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 328, 2 Sup. Ct. 719; *Id.*, 137 U. S. 568, 11 Sup. Ct. 185.

¹⁰⁶ The leading case on this subject as to the right of abutting owners to recover compensation is *Sperb v. Metropolitan El. Ry. Co.*, 137 N. Y. 155, 32 N. H. 1050.

¹⁰⁷ *Jones v. Railway Co.*, L. R. 3 Q. B. 733.

¹⁰⁸ *Roths v. Waterworks Com'rs* (1882) 7 App. Cas. 694, 1 Eng. Ruling Cas. 351. Cf. *Dodge v. Essex Co. Com'rs*, 3 Metc. (Mass.) 380; *Brown v. Railroad Co.*, 5 Gray (Mass.) 35; *Sabin v. Railroad Co.*, 25 Vt. 363; *Whitehouse v. Railroad Co.*, 52 Me. 208.

¹⁰⁹ *Northern Transp. Co. v. City of Chicago*, 99 U. S. 635; *City of Vicksburg v. Herman*, 72 Miss. 211, 16 South. 434.

¹¹⁰ *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195; *Cumberland v. Willison*, 50 Md. 138; *Henry v. Bridge Co.*, 8 Watts & S. 85; *Governor of British Cast-Plate Manufacturers v. Meredith*, 4 Term R. 794; *Sutton v. Clarke*, 6 Taunt. 29. Et vide *Dill. Mun. Corp.* § 990.

¹¹¹ *Denby v. Willer*, 59 Wis. 240, 18 N. W. 169. The license may be implied.

Abuse or Excess of Authority.

"The rightful and bona fide exercise of a lawful power or authority cannot afford a basis for an action. If the power or right is exercised carelessly, negligently, improperly, and maybe maliciously, the party so exercising it may be liable to respond in damages for any injury, direct or consequential, resulting to another from the exercise of the right or power; but such liability can only arise upon and for the manner of doing the act, and not for the act itself."¹¹² Where, however, the injury complained of is not properly the necessary result of the authorized act, the exemption does not apply.¹¹³ Thus, ordinarily a railroad company cannot monopolize a street, in derogation of the public and private use to which it should be applied.¹¹⁴ Statutory authority to do what would otherwise be an actionable wrong does not exempt from the requirement of the exercise of care, judgment, and caution.¹¹⁵ And, generally, negligence and excess in the exercise of statutory authority attach liability.¹¹⁶

Korte v. St. Paul Trust Co., 54 Minn. 530, 56 N. W. 246. So where the damage is consequent upon the doings of cattle allowed to run at large by ordinance. *Fritz v. Railroad Co.*, 22 Minn. 404.

¹¹² *Slatten v. Des Moines Val. R. Co.*, 29 Iowa, 148; *Vaughan v. Railway Co.*, 5 Hurl. & N. 679.

¹¹³ *Canal Co. v. Lee*, 22 N. J. Law, 243. Cf. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177, 178; *Northern Transp. Co. v. City of Chicago*, 99 U. S. 635-642; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317-331, 2 Sup. Ct. 719. See, also, *Id.*, 137 U. S. 568, 11 Sup. Ct. 185.

¹¹⁴ *Janesville v. Milwaukee & M. R. Co.*, 7 Wis. 484; *Baltimore & P. R. Co. v. First Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719.

¹¹⁵ *London & N. W. R. Co. v. Bradley*, 3 Macn. & G. 341.

¹¹⁶ *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320; *City of Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 28 N. E. 366; *Rockwood v. Wilson*, 11 Oush. 221; *Burcky v. Town of Lake*, 30 Ill. App. 23; *Georgetown, B. & L. Ry. Co. v. Doyle*, 9 Colo. 549, 13 Pac. 699; *Brewer v. Boston, etc., R. Co.*, 113 Mass. 52; *Krug v. St. Mary's Borough*, 152 Pa. St. 30, 25 Atl. 161.

SAME—EXERCISE OF COMMON-LAW RIGHTS.

38. No action lies for damages incident to acts authorized by common law. These may be classified as

- (a) Common rights.**
- (b) Disciplinary powers.**
- (c) Rights of necessity.**
- (d) Right of private defense.**

Common Rights.

If a man be injured by the exercise of another's ordinary rights, he has no action. This immunity in the exercise of common rights is a restatement, in a somewhat different form, of the doctrine embodied in the "damnum sine injuria." The right to transact lawful business is a universal one. Damages consequent upon competition are not actionable. "To attempt to limit * * * competition * * * would probably be as hopeless an endeavor as the experiment of King Canute."¹¹⁷

The right to use a personal or local name is a common right. Accordingly, a person cannot acquire a right to the exclusive use of the word "Columbia," as a trade-mark;¹¹⁸ nor the words "Liver Medicine."¹¹⁹

Same—Use of Property.

"By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender of every other man of the same right, and the security, advantage, and protection which the law gives me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state."¹²⁰ A blacksmith may operate his

¹¹⁷ Bowen, L. J., in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, affirming [1892] App. Cas. 25. And see 22 Hen. VI. p. 14, pl. 23, A. D. 1443; *Deh v. Winfree*, 80 Tex. 402-405, 16 S. W. 111.

¹¹⁸ *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151.

¹¹⁹ *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165.

¹²⁰ Earl, J., in *Losee v. Buchanan*, 51 N. Y. 476, 484.

forge,¹²¹ and a merchant his store,¹²² although his neighbor thereby suffers annoyance.

Disciplinary Powers.

The law recognizes disciplinary powers in private persons and associations, and damages consequent upon their reasonable exercise cannot be recovered. Persons exercising quasi judicial powers, as the officers of universities, colleges, clubs, committees, beneficial associations, corporations, and the like, are not liable for removing a man from office or membership, or otherwise dealing with him to his disadvantage, providing (1) they act in good faith; (2) give him fair and sufficient notice of his offense; (3) give him an opportunity of defending himself; (4) observe rules, if any, laid down by the statute, or the particular body to which they belong.¹²³ If these conditions are satisfied, the court will not interfere, even if it thinks the decision wrong.¹²⁴ The statute may give absolute discretionary power.¹²⁵ An action for damages, however, may be sustained for illegal expulsion. The fact that after expulsion the person was discharged from the service in which he was employed will entitle him to damages.¹²⁶

Private persons sometimes possess disciplinary powers, for the reasonable exercise of which they are not liable in tort. Thus, the master of a merchant ship may use summary force to preserve order and discipline.¹²⁷ Parents, guardians, teachers, and, generally, persons in loco parentis, may justify the enforcement of discipline, moderate correction, detention, and the like, by plea of authority.¹²⁸

¹²¹ *Doellner v. Tynan*, 38 How. Prac. (N. S.) 182; *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 7 Misc. Rep. 374, 27 N. Y. Supp. 907, collecting cases.

¹²² *McGuire v. Bloomingdale*, 8 Misc. Rep. 478, 29 N. Y. Supp. 580.

¹²³ *Fraz. Torts* (2d Ed.) 13; *Loubat v. Leroy*, 65 How. Prac. (N. Y.) 138; *Wachtel v. Noah Widows & O. B. Soc.*, 84 N. Y. 28; *Com. v. St. Patrick Ben. Soc.*, 2 Bin. (Pa.) 441.

¹²⁴ *Dawkins v. Antrobus*, 17 Ch. Div. 615.

¹²⁵ *Hayman v. Governors of Rugby School*, L. R. 18 Eq. 28.

¹²⁶ *People v. Musical Mutual Protective Union*, 118 N. Y. 101, 23 N. E. 129; *Innes v. Wylie*, 1 Car. & K. 257. As to expulsion from clubs, see *Com. v. Union League of Philadelphia*, 135 Pa. St. 301, 19 Atl. 1030.

¹²⁷ Per Lord Stowell in *The Agincourt*, 1 Hagg. Adm. 271-274.

¹²⁸ Y. B. 21 Edw. IV. fol. 6, pl. 1.

Rights of Necessity.

There is no liability for acts or omissions as to which a person has no option. "The rights of necessity are a part of the law."¹²⁹ Necessity may justify the destruction of property for the general good. "For the commonwealth, a man shall suffer damage; as, for saving a city or town, a house shall be plucked down if the next one be on fire; and a thing for the commonwealth any man may do without being liable to an action."¹³⁰ A fortiori, peril to human life may constitute such necessity as would excuse what would be otherwise wrongdoing. "If," said Lord Blackburn,¹³¹ "a house in which a person ill of an infectious order lay bedridden took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames, or to be carried out through the crowd, at the risk, or even at the certainty, of infecting some of them, no one could suppose that those who carried out the sick person could be punishable; and probably a much less degree of necessity might form an excuse." Similarly, in cases of negligence, one who imperils his personal safety in the discharge of a duty like saving human life is not prevented, because of such conduct as constituting contributory negligence, from recovering damages done to him.¹³² On the same principle, where a highway becomes obstructed and impassable from temporary causes, as a snowdrift, a traveler has a right to go, extra viam, upon adjoining lands, without being guilty of trespass.¹³³

Right of Private Defense.

No action lies for damages done in consequence of the exercise of the instinct common to all animate things, to protect themselves

¹²⁹ *Respublica v. Sparhawk*, 1 Dall. 357-362; *Mouse's Case*, 12 Coke, 63; *Burton v. McClellan*, 3 Ill. 434; *American Print Works v. Lawrence*, 23 N. J. Law, 604.

¹³⁰ *Case of King's Prerogative*, 12 Coke, 13; *McDonald v. City of Red Wing*, 13 Minn. 38 (Gil. 25); *Bowditch v. Boston*, 101 U. S. 16; *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277; *Hyde Park v. Gay*, 120 Mass. 590; *Surocco v. Geary*, 3 Cal. 70; *American Print Works v. Lawrence*, 23 N. J. Law, 590; *Anon.*, Y. B. 21 Hen. VII., fol. 27, pl. 5; *Mouse's Case*, 12 Coke, 63.

¹³¹ *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 193-205.

¹³² *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Clark v. Famous Shoe & Clothing Co.*, 16 Mo. App. 463.

¹³³ *Donahoe v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 560; *Bullard v. Harrison*, 4 Maule & S. 387-393; *Campbell v. Race*, 7 Cush. (Mass.) 408. And see *Michaelson v. Denison*, 3 Day (Conn.) 294.

and their own, within the limits of such private defense as are determined by law.¹³⁴ If a person, in lawful self-defense, fires a pistol at an assailant, and, missing him, wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence.¹³⁵ In the same way, the owner has the right to do anything that is apparently and reasonably necessary to be done for the protection of his property.¹³⁶ So, where the law provided that no fur-bearing animals should be killed within certain periods, and within such period a person killed a mink which was about to destroy his geese, it was held that such law did not interfere with the constitutional right to defend property, and could not prevent the killing of wild animals, where there was imminent danger that they would destroy private property.¹³⁷ The mere fact that an animal is committing a trespass does not justify killing or wantonly abusing it.¹³⁸

The justification of damages consequent upon the exercise of the right of self-defense depends upon the consideration whether the right was exercised in a reasonable manner, in view of all the circumstances of the case.¹³⁹ Excessive defense of the person may become an assault and battery. So, in defense of property, as in the case of the defense of domestic animals from the attacks of other animals, the relative value of the animals may be proper for the jury to consider, in arriving at a conclusion whether the defense was a reasonable one under the circumstances.¹⁴⁰

¹³⁴ One may resist an officer seeking to arrest him under a void writ. *Com. v. Crotty*, 10 Allen (Mass.) 403.

¹³⁵ *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132; *Scott v. Shepherd*, 2 W. Bl. 892.

¹³⁶ *Walker v. Wetherbee*, 65 N. H. 656, 23 Atl. 621; *Com. v. Kennard*, 8 Pick. (Mass.) 133 (resisting officer).

¹³⁷ *Aldrich v. Wright*, 53 N. H. 398. And see *Putnam v. Payne*, 13 Johns. (N. Y.) 312; *Rippy v. State*, 2 Head (Tenn.) 217; *State v. Bryson*, 2 Winst. Law (N. C.) 86.

¹³⁸ *Johnson v. Patterson*, 14 Conn. 1; *Ford v. Taggart*, 4 Tex. 492; *Tyner v. Cory*, 5 Ind. 216; *Hobson v. Perry*, 1 Hill (S. C.) 277; *Clark v. Kellher*, 107 Mass. 406; *Livermore v. Batchelder*, 141 Mass. 179, 5 N. E. 275.

¹³⁹ *Spray v. Ammerman*, 66 Ill. 309.

¹⁴⁰ *Cooley*, Torts, 346; *Anderson v. Smith*, 7 Ill. App. 354; *Simmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702; *Parrott v. Hartsfield*, 4 Dev. & B. (N. C.) 110; *Hinckley v. Emerson*, 4 Cow. (N. Y.) 351; *Boecher v. Lutz*, 13 Daly (N. Y.) 28; *Dunning v. Bird*, 24 Ill. App. 270; *Lipe v. Blackwelder*, 25 Ill. App. 123. See,

VARIATIONS BASED ON STATUS.

39. Under this head will be considered the liability of

(a) Natural persons, including

- (1) Insane persons;**
- (2) Infants;**
- (3) Drunkards;**
- (4) Convicts;**
- (5) Alien enemies.**

(b) Artificial persons, including

- (1) Private corporations;**
- (2) Municipal and quasi municipal corporations;**
- (3) Corporations not municipal engaged in public works.**

SAME—INSANE PERSONS.

40. Generally, an insane person is liable for his torts, to the extent of compensation for the actual loss sustained by the injured party; but when the wrong involves personal capacity, and such capacity is impossible, because of mental derangement, there can be no recovery.

Absolute Liability.

The view of the law which held that men acted at their peril, and that liability for tortious conduct was absolute, logically recognized that so long as a duty was violated, and harm ensued, it was immaterial whether the damage was due to an accident, or to a person incapable of reason. Thus, it was said in *Weaver v. Ward*:¹⁴¹ "If a lunatic hurt a man, he shall be answerable in trespass." It was an easy step from this to the general position that an insane person is universally liable for torts. The reasoning is further justified by the suggestion that such a ruling accords with public policy, recognized and enforced by the law to promote the general welfare, and

also, *Livermore v. Batchelder*, 141 Mass. 179, 5 N. E. 275; *Bowers v. Horen*, 98 Mich. 420, 53 N. W. 535.

¹⁴¹ Hob. 134.

to avoid escape from liability by use of specious pretense of mental incompetency,¹⁴² and to apply the rule that, where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is manifest that this reasoning ignores any analysis into the basis of liability in tort.¹⁴³

An insane person has been held liable in tort for causing death to another by an act which would have been felonious, except for the insanity.¹⁴⁴ An action of false imprisonment has been sustained against a lunatic, who, in his capacity as justice of the peace, caused plaintiff to be wrongfully arrested.¹⁴⁵ Insanity is no defense to an action for trespass to real estate.¹⁴⁶

Qualified Liability.

It is urged with great force, with the result of at least partial acceptance, that this conception is too radical. The early cases on accidental trespass have not been universally followed. It is insisted that they were unsound in reason, and that, so far as their actual enunciation of the law is concerned, they are not authority for the position they are cited to sustain.¹⁴⁷

It may, perhaps, clarify the condition to consider the liability of a lunatic with reference to the various ways in which liability for torts may attach.¹⁴⁸ With respect to liability for personal commis-

¹⁴² Cooley, Torts, § 100.

¹⁴³ See Busw. Insan. § 355; Cooley, Torts, pp. 98, 100; Reeve, Dom. Rel. p. 386, cited by Earl, J., in *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449.

¹⁴⁴ *Jewell v. Colby*, 66 N. H. 399, 24 Atl. 902; *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239, affirming 24 Ill. App. 605. Insanity is no defense to assault. *Taggard v. Innes*, 12 U. C. C. P. 77. And see *Ward v. Conatser*, 4 Baxt. (Tenn.) 64.

¹⁴⁵ *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647; *Cross v. Kent*, 32 Md. 581; *Ward v. Conatser*, supra; *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239; *Jackson v. King*, 15 Am. Dec. 368, note; *Gates v. Miles*, 3 Conn. 64-70; *Amick v. O'Hara*, 6 Blackf. (Ind.) 258, 259.

¹⁴⁶ *Amick v. O'Hara*, supra; *Weaver v. Ward*, Hob. 134; *Haycraft v. Creasy*, 2 East, 92.

¹⁴⁷ While there are many dicta to the effect in England (see Bac. Abr. "Trespass," G; Maxims Reg. 7, note; 2 Rolle, Abr. 547; *Weaver v. Ward*, Hob. 134; *Haycraft v. Creasy*, 2 East, 92-104), it is said, on good authority, that there is no reported instance of an action for tort ever having been brought in England against a lunatic. Clerk & L. Torts, 33. Query, is not *Cross v. Andrews*, 2 Cro. Ellz. 622, such a case?

¹⁴⁸ Ante, p. 35.

sion, it is denied that an insane person can be a legal cause, and insisted that injuries attributable to such a person are really due to inevitable accident, or the act of God, for which no action lies. Therefore, it would seem that an irresponsible defendant cannot be held liable for negligent personal conduct.¹⁴⁹

It would certainly seem reasonable to recognize this principle in that class of cases in which the mental attitude of the wrongdoer is an essential ingredient. Thus, where malice is a necessary element, an idiot can be guilty of the malice of a brute, but not of a sentient creature. Hence, it has been held that insanity will preclude responsibility for slander. The distinction is recognized more clearly by text writers than by decisions.¹⁵⁰ It is insisted with good reason that limitation of responsibility for tort based on insanity should apply only to persons so far deranged as to be incapable of committing a voluntary act; that is, the derangement must extend so far as to make intent impossible.¹⁵¹

On the other hand, if liability attaches because of relationship or instrumentalities, no personal fault or capacity is involved. There would not seem to be any reason why a lunatic should not be held responsible as a sane man. It is generally recognized that a lunatic is liable under circumstances which would attach liability to a person *compos mentis* in the management of property. Thus, liability extends to injury occasioned by defective condition of a building belonging to an insane person, for the care and management of whose estate a guardian has been appointed.¹⁵²

¹⁴⁹ Whart. Neg. § 88; Sedg. Dam. 455; 16 Am. & Eng. Enc. Law, tit. "Negligence"; post, p. 463, "Negligence." Contra *Williams v. Hays* (1894) 143 N. Y. 442, 38 N. E. 449.

¹⁵⁰ Pol. Torts, § 46; Cooley, Torts, § 103; Bish. Noncont. Law, 505; Townsh. Sland. & L. § 248; *Gates v. Meredith*, 7 Ind. 440; *Bryant v. Jackson*, 6 Humph. 139 (but see *Ward v. Conatser*, 4 Baxt. [Tenn.] 64); *Yeates v. Reed*, 4 Blackf. 463; *Horner v. Marshall*, 5 Munf. (Va.) 466. And see *Dickinson v. Barber*, 9 Mass. 225.

¹⁵¹ Pig. Torts, c. 7. As to *Krom v. Schoonmaker*, 3 Barb. 647, it is to be "presumed that the extent of the insanity was not great." Clerk & L. Torts, p. 34, note a. The defense in *Cross v. Andrews*, 2 Cro. Ellz. 622, was that defendant was sick and non compos.

¹⁵² *Morain v. Devlin*, 132 Mass. 87; *Behrens v. McKenzie*, 23 Iowa, 333-339.

SAME—INFANTS.

41. Infants are generally liable in law for their torts in no wise connected with contract. They can neither escape liability because commanded by another to do wrong, nor create liability on their own part by authorizing or adopting the commission of the tort of another person.
42. Tenderness of age, in proportion as it affects capacity to act intelligently, may be material to their liability, when intention to do wrong, or want of care, is an essential ingredient of the injury.

Infancy Ordinarily no Defense.

The law with respect to liability of infants has proceeded rather on the theory of compensating the person injured than of consistently maintaining any logical doctrine as to the mental attitude of the wrongdoer, and of basing the responsibility on the wrongful intention or inadvertence. Thus, an infant is liable in trespass for breaking down and destroying shrubbery,¹⁵³ or in assault.¹⁵⁴ A minor is liable in damages for seduction,¹⁵⁵ even under promise of marriage, or for bastardy;¹⁵⁶ also, in trover;¹⁵⁷ also, liable in case, for negligently handling a gun,¹⁵⁸ or for negligence in connection with his property in his agent's hands.¹⁵⁹

¹⁵³ Huchting v. Engel, 17 Wis. 230.

¹⁵⁴ Peterson v. Haffner, 59 Ind. 130; Campbell v. Stakes, 2 Wend. 137. And see Paul v. Hummel, 97 Am. Dec. 381; Conway v. Reed, 27 Am. Rep. 354; Raker v. Lovett, 4 Am. Dec. 88; Bullock v. Babcock, 3 Wend. 391.

¹⁵⁵ Fry v. Leslie, 87 Va. 269, 12 S. E. 671; Becker v. Mason, 93 Mich. 336, 53 N. W. 361; Lee v. Hefley, 21 Ind. 98; Hamilton v. Lomax, 26 Barb. 615.

¹⁵⁶ Chandler v. Com., 4 Metc. (Ky.) 66.

¹⁵⁷ Freeman v. Boland, 14 R. I. 39; Ray v. Tubbs, 28 Am. Rep. 519; Towne v. Wiley, 56 Am. Dec. 85; Vasse v. Smith, 6 Cranch, 226; Oliver v. McClellan, 21 Ala. 675; Pelgne v. Sutcliffe, 17 Am. Dec. 756; Ashlock v. Vivell, 29 Ill. App. 388; Lewis v. Littlefield, 15 Me. 233; Homer v. Thwing, 3 Pick. (Mass.) 492.

¹⁵⁸ Conway v. Reed, 66 Mo. 346.

¹⁵⁹ Harding v. Larned, 4 Allen, 426; Harding v. Weld, 128 Mass. 587.

The authority of parent is no excuse for the commission of a trespass by a child.¹⁶⁰ Liability of a parent for the tort of a child is governed by the ordinary principles of liability of a principal for the acts of his agent, or a master for his servant. It does not arise out of a mere relation of parent and child.¹⁶¹ Infants cannot empower an agent or attorney to act for them, nor affirm what another may have assumed to do on their account.¹⁶² They cannot be held liable for "torts by prior or subsequent assent, but only for their own act."¹⁶³

Tenderness of Age as a Defense.

In certain classes of cases, however, the inability of very young infants to be intelligent actors, and therefore their inability to judicially cause a wrong, has been recognized. In such cases the wrong is considered due to unavoidable accident.¹⁶⁴ And where malice is a necessary element an infant may or may not be liable, according as his age and capacity may justify imputing malice to him, or may preclude the idea of his indulging it.¹⁶⁵ However, infants have been held liable for frauds,¹⁶⁶ deceit,¹⁶⁷ and for slander.¹⁶⁸ Extremely young children cannot be guilty of contributory negligence.¹⁶⁹

¹⁶⁰ *Humphrey v. Douglass*, 10 Vt. 71; *Scott v. Watson*, 46 Me. 362; *Huchting v. Engel*, 17 Wis. 230; *School Dist. v. Bragdon*, 23 N. H. 507; *Wilson v. Garrard*, 59 Ill. 51.

¹⁶¹ *Tift v. Tift*, 4 Denio (N. Y.) 175; *Smith v. Davenport*, 45 Kan. 423, 25 Pac. 851; *Chandler v. Deaton*, 37 Tex. 406; *Wilson v. Garrard*, *supra*.

¹⁶² *Whitney v. Dutch*, 14 Mass. 457; *Knox v. Flack*, 22 Pa. St. 337; *Robbins v. Mount*, 4 Rob. (N. Y.) 553; *Armitage v. Widoe*, 36 Mich. 124. But see *Sikes v. Johnson*, 16 Mass. 389.

¹⁶³ Co. Litt. 180b, note; *Burnham v. Seaverns*, 101 Mass. 360; *Robbins v. Mount*, 33 How. Prac. (N. Y.) 24; *Cunningham v. Railway Co.*, 77 Ill. 178.

¹⁶⁴ *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

¹⁶⁵ *Cooley*, Torts; *Johnson v. Pye*, 1 Sid. 258.

¹⁶⁶ *Barham v. Turbeville*, 57 Am. Dec. 782; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Badger v. Phinney*, 15 Mass. 359; *Catts v. Phalen*, 2 How. (U. S.) 376-382.

¹⁶⁷ *Fitts v. Hall*, 9 N. H. 441; *Word v. Vance*, 1 Nott & McC. (S. C.) 197.

¹⁶⁸ *Defries v. Davis*, 1 Bing. N. C. 692; *Hodsdon v. Grissel*, Noy, 129.

¹⁶⁹ See post, p. 463.

43. Infants, not being liable for their contracts, cannot be elected into responsibility by being sued *ex delicto* on a cause of action really *ex contractu*, where the law allows choice of form of action. The test of whether an action lies against an infant, under such circumstances, is whether the infant has done anything in excess of mere violation of a contract, and in breach of duty which the law has created or superinduced upon the contract. They may, however, in some cases, be sued *ex contractu* for cause of action *ex delicto*.

Election of Remedies—Tort or Contract.

When a cause of action against an infant is really founded upon contract, the plaintiff cannot avoid the defense of infancy by framing his action in tort. "Where the substantial ground of action rests on promises, the plaintiff cannot, by changing his form of action, render a person liable who would not have been liable on his promise."¹⁷⁰

Same—Bailment.

If an infant bailee does any willful or positive act, amounting to an election on his part to disaffirm the contract, or converts the property to his own use, or if he wantonly and intentionally commits a trespass, his infancy is no protection.¹⁷¹ Thus, where a boy hired a horse unfit, and agreed not to be used, for leaping, and allowed his friend to jump the animal to its death, an action *ex delicto* was sustained.¹⁷² In Pennsylvania, on the other hand, it has been insisted

¹⁷⁰ Plg. Torts, 43. This does not differ materially from the test proposed by Mr. Wallace in note to *Vasse v. Smith*, 6 Cranch, 226, or by Mr. Ewell in his note to *Gilson v. Spear*, 38 Vt. 311, or by Mr. Bigelow on Fraud, 216-218.

¹⁷¹ *Vasse v. Smith*, 6 Cranch, 226; *Wheeler & Wilson Manuf'g Co. v. Jacobs* (Com. Pl.) 21 N. Y. Supp. 1006; *Peigne v. Sutcliffe*, 4 McCord (S. C.) 387; *Moore v. Eastman*, 1 Hun, 578; *Root v. Stevenson's Adm'r*, 24 Ind. 115.

¹⁷² *Burnard v. Haggis*, 14 C. B. (N. S.) 45. See, also, *Hall v. Corcoran*, 107 Mass. 251; *Ray v. Tubbs*, 28 Am. Rep. 519; *Green v. Sperry*, 16 Vt. 390; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Freeman v. Boland*, 14 R. I. 30; *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; *Woodman v. Hubbard*, 25 N. H. 73; *Fish v. Ferris*, 5 Duer (N. Y.) 49; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Towne v. Wiley*, 23 Vt. 355; *Moore v. Eastman*, 1 Hun, 578.

that, even if the horse were killed, the infant would not be liable.¹⁷³ In a leading New Hampshire case it was held that an infant could not be held liable for failure to drive skillfully, but that he can be held if he kills the horse by positive tortious act.¹⁷⁴

Same—Fraud.

As to liability of infants for fraud, if an infant, at the time of obtaining goods, fraudulently concealed his minority, the vendor may rescind the contract, and recover the goods sold.¹⁷⁵ But if, before the discovery of the fraud, the infant sold the goods, the vendor is without remedy. He cannot recover the goods, for they are gone; he cannot sue in deceit, for damages, for that would be, in substance, a means of enforcing the contract to pay the price.¹⁷⁶ That an infant induced a contract by fraudulent representation as to his being of age, or as to other matters, does not deprive him of the defense of his infancy; and bringing the action for damages, in deceit, instead of on the contract, does not enable the deceived person to succeed in his litigation.¹⁷⁷ But the opinions are not unanimous on this point.¹⁷⁸

Same—Election to Sue in Assumpsit.

An infant may, however, be sued *ex contractu*, in *assumpsit*, for a cause of action really *ex delicto*. Thus, if he convert the property

¹⁷³ *Penrose v. Curren*, 3 Rawle (Pa.) 351; *Wilt v. Welsh*, 6 Watts (Pa.) 9.

¹⁷⁴ *Eaton v. Hill*, 50 N. H. 235.

¹⁷⁵ *Badger v. Phinney*, 15 Mass. 359; *Mills v. Graham*, 1 Bos. & P. (N. R.) 140; *Nolan v. Jones*, 53 Iowa, 387, 5 N. W. 572; *Neff v. Landis*, 110 Pa. St. 204, 1 Atl. 177.

¹⁷⁶ *Johnson v. Pye*, 1 Sid. 258; *Price v. Hewett*, 8 Exch. 146; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329; *Manning v. Johnson*, 26 Ala. 446.

¹⁷⁷ *Gilson v. Spear*, 38 Vt. 311; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *West v. Moore*, 14 Vt. 447. But see, on the other hand, *Word v. Vance*, 1 Nott & McC. (S. C.) 197; *Flitts v. Hall*, 9 N. H. 441. See, generally, *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695; *Johnsor v. Pie*, 1 Keb. 913; *Wieland v. Koblick*, 110 Ill. 16; *Grove v. Nevill*, 1 Keb. 778; *Cannam v. Farmer*, 3 Exch. 698; *Price v. Hewett*, 8 Exch. 146; *Sims v. Everhardt*, 102 U. S. 300; *Whitcomb v. Joslyn*, 51 Vt. 79; *Burley v. Russell*, 10 N. H. 184; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40.

¹⁷⁸ *Harseim v. Cohen* (Tex. Civ. App.) 25 S. W. 977; *Burley v. Russell*, 34 Am. Dec. 146; *Rice v. Boyer* (Ind. Sup.) 9 N. E. 420; *Dillon v. Burnham*,

of another, the latter can recover in assumpsit. This serves to show that the action of assumpsit still retains traces of the *ex delicto* character of its origin.¹⁷⁹

SAME—DRUNKARDS.

44. Drunkards are liable for all torts committed by them.

Their condition may, however, when it amounts to insanity, perhaps operate as a full defense, as far as insanity is a defense to an action in tort.

While the acts of a drunkard are often involuntary, his condition is generally due to a voluntary act, and his acts become voluntary by reflection. "Drunkenness is no excuse to a crime. It cannot justify a tort. The making a beast of one's self may be likened to the keeping of a beast; and, as in some cases the scienter is presumed, so it will be presumed that a man knows that if he gets drunk he will be likely to commit acts which will produce injury to other people."¹⁸⁰ Therefore, if a drunken man say to another, "He is a damned thief; he stole from me," his drunken condition is no defense.¹⁸¹ So a drunkard is liable for damages done by negligent driving.¹⁸² Perhaps delirium tremens may be a defense, for it is a species of insanity, and, like other insanity, must affect responsibility for acts, criminally and civilly.¹⁸³

43 Kan. 77, 22 Pac. 1016. And see *Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. 877; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206.

¹⁷⁹ *Shaw v. Coffin*, 58 Me. 254; *Elwell v. Martin*, 32 Vt. 217; *Munger v. Hess*, 28 Barb. (N. Y.) 75.

¹⁸⁰ *Pig. Torts*, §§ 216, 217; *McKee v. Ingalls*, 5 Ill. 30; *Alger v. Lowell*, 3 Allen (Mass.) 402; *Welty v. Indianapolis & V. R. Co.*, 105 Ind. 55, 4 N. E. 410; *Hubbard v. Town of Mason City*, 60 Iowa, 400, 14 N. W. 772; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Cramer v. Burlington*, 42 Iowa, 315; *Monk v. Town of New Utrecht*, 104 N. Y. 552, 11 N. E. 268.

¹⁸¹ *Reed v. Harper*, 25 Iowa, 87.

¹⁸² *Cassady v. Magher*, 85 Ind. 228. Compare *Engleken v. Hilger*, 43 Iowa, 563; *Kearney v. Fitzgerald*, Id. 580.

¹⁸³ *Maconnehey v. State*, 5 Ohio St. 77; *O'Brien v. People*, 48 Barb. (N. Y.) 275.

SAME—CONVICTS—ALIEN ENEMIES.

45. In England, neither a convict not lawfully at large, nor an alien enemy, can sue in tort. The rule is otherwise in America, as to a convict, and perhaps, also, to an alien enemy.

The English rule that a convict cannot recover in tort is the result of the common-law doctrine, that a convict is *civiliter mortuus*, enforced by statute.¹⁸⁴ The position of an alien enemy and a convict, Mr. Pollock thinks, must be the same.¹⁸⁵

In America the right of a confined convict to sue for tort has been recognized and enforced.¹⁸⁶ In *McVeigh v. United States*,¹⁸⁷—a proceeding against a resident within the Confederate lines, and a rebel, for the forfeiture of lands,—Mr. Justice Swayne says, as to the claim that an alien enemy could have no *locus standi* in the forum: "If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot on our jurisprudence."

SAME—PRIVATE CORPORATIONS.

46. Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons. That the conduct complained of necessarily involved malice or was beyond the scope of corporate authority, constitutes no defense to their liability.¹⁸⁸

¹⁸⁴ Pol. Torts, c. 3, citing 33 & 34 Vict. c. 23, §§ 8, 30.

¹⁸⁵ Pol. Torts, c. 3, note c.

¹⁸⁶ *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435; *Willingham v. King*, 23 Fla. 478, 2 South. 851; *Cannon v. Windsor*, 1 Houst. (Del.) 143.

¹⁸⁷ 11 Wall. 259. And generally, as to legal status of a public enemy, see *McNair v. Toler*, 21 Minn. 175; *Miller v. U. S.*, 11 Wall. 268; *Dean v. Nelson*, 10 Wall. 158; *Lasere v. Rochereau*, 17 Wall. 437; *University v. Finch*, 18 Wall. 106; *Windsor v. McVeigh*, 93 U. S. 274.

¹⁸⁸ *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

Corporations are clearly liable for torts not necessarily involving personal fault,¹⁸⁹ and for negligence.¹⁹⁰ In cases, however, in which the mental attitude of the wrongdoer is peculiarly involved, as in fraud¹⁹¹ or malicious wrongs,¹⁹² it has been contended that, inasmuch as a corporation had no soul, it could not be held liable. But it is now definitely settled that a corporation can be guilty of malice, in a legal sense.¹⁹³ Thus, it may be held liable for malicious prosecution,¹⁹⁴ or for libel.¹⁹⁵ And, as to fraud, a corporation will be held liable where an individual would.¹⁹⁶

A corporation can act only by agents or servants. For all torts

¹⁸⁹ *Yarborough v. Bank of England*, 16 East. 6; *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452.

¹⁹⁰ *Kansas City, M. & B. R. Co. v. Sanders*, 98 Ala. 293, 13 South. 57; *Railway Co. v. Ryan*, 56 Ark. 245, 19 S. W. 830.

¹⁹¹ *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145.

¹⁹² *Abrath v. North Eastern Ry. Co.*, 11 Q. B. Div. 440; *Stevens v. Railway Co.*, 10 Exch. 351; *Henderson v. Midland Ry. Co.*, 20 Wkly. Rep. 23; *Childs v. Bank*, 17 Mo. 213; *Owsley v. Railway Co.*, 37 Ala. 560.

¹⁹³ *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 56 N. W. 9; *Lothrop v. Adams*, 133 Mass. 471-481; *Salt Lake City v. Hollister*, 118 U. S. 256-262, 6 Sup. Ct. 1055; *Reed v. Home Sav. Bank*, 130 Mass. 443-445; *Krulevitz v. Eastern R. Co.*, 140 Mass. 573, 5 N. E. 500.

¹⁹⁴ *Abrath v. North Eastern Ry. Co.*, 11 Q. B. Div. 440; *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117; *Frost v. Domestic Sewing Mach. Co.*, 133 Mass. 563; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 352; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468; *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77; *Vance v. Erie R. Co.*, 32 N. J. Law, 334; *Carter v. Howe Mach. Co.*, 51 Md. 290.

¹⁹⁵ *Rex v. Watson*, 2 Term R. 199; *Aldrich v. Press Printing Co.*, 9 Minn. 133 (Gil. 123); *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513, 20 N. E. 109; *Samuels v. Evening Mail Ass'n*, 75 N. Y. 604; *Maynard v. Fireman's Ins. Co.*, 34 Cal. 48, 47 Cal. 207; *Boogher v. Life Ass'n*, 75 Mo. 319; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Lawless v. Anglo Egyptian Cotton & Oil Co.*, L. R. 4 Q. B. 262; *Carter v. Howe Mach. Co.*, 51 Md. 290.

¹⁹⁶ *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Butler v. Watkins*, 13 Wall. 456; *Candy v. Globe Rubber Co.*, 37 N. J. Eq. 175; *Fogg v. Griffin*, 2 Allen, 1; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145-157; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162.

which can be committed by a servant or agent, it is clearly responsible.¹⁹⁷ It cannot be held liable for tortious acts which can be performed only by wrongdoer directly. Thus, one cannot commit slander by deputy; hence a corporation cannot commit slander.¹⁹⁸ But it is not entirely accurate to limit liability of a corporation exclusively to torts which can be committed by an agent. Liability may be attached to them because of injury resulting from use or custody of an animate instrumentality, as, for example, a dog;¹⁹⁹ or an inanimate instrumentality, as a torpedo.²⁰⁰ And a corporation may be liable without reference to the conduct of its agents or servants, as where it wholly neglects or omits to perform any corporate duty.²⁰¹

Ultra Vires.

It has been held that a corporation is not liable for torts when the act complained of is not within the corporate authority.²⁰² But the better opinion would seem to be that a corporation is liable for all torts committed by it, although beyond its chartered powers, implied, express, or incidental, if liability, under the circumstances, would have attached to a private individual. Thus, if a national bank, without authority from its charter, take special deposits, with the knowledge of its directors, it is liable for the loss of such deposits through its gross carelessness.²⁰³

¹⁹⁷ Fishkill Sav. Inst. v. National Bank, 80 N. Y. 162; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719; Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57-64.

¹⁹⁸ Townsh. Sland. & L. § 265. See vide Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 4 S. E. 905.

¹⁹⁹ Stiles v. Cardiff Steam Nav. Co., 33 Law J. Q. B. 310.

²⁰⁰ Pittsburgh, C. & St. L. Ry. Co. v. Shields, 47 Ohio, 387, 24 N. E. 658.

²⁰¹ Riddle v. Proprietors of Locks & Canals, 7 Mass. 169; Weld v. Proprietors of Side Booms, 6 Greenl. (Me.) 93; Parnaby v. Canal Co., 11 Adol. & H. 223; Donahoe v. Wabash, St. L. & P. Ry. Co., 83 Mo. 560; Erie City Pass. Ry. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. 269.

²⁰² Green v. Omnibus Co., 7 C. B. 290, 301 (Erle, C. J.); Clerk & L. Torts, 49; Weckler v. First Nat. Bank, 42 Md. 581. But see Isaacs v. Third Ave. R. Co., 47 N. Y. 122.

²⁰³ National Bank v. Graham, 100 U. S. 699; Merchants' Bank v. State Bank, 10 Wall. 604; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Central Railroad & Banking Co. v. Smith, 76 Ala. 572; Alexander v. Relfe, 74 Mo. 495.

Scope of Agents' or Servants' Authority.

It is constantly said that a corporation is liable for the conduct of its agents or servants only when such conduct is authorized expressly, impliedly, or by ratification, or when such conduct is within the scope of such agents' or servants' employment.²⁰⁴ There would seem to be no difference between the principle which governs the liability of a corporation as a principal or master from those which control the liability of a natural person as principal and master.²⁰⁵

Corporators, by their acts, may make the corporation liable, on essentially the same principles as would any ordinary agent. Unlike cases of agency, the liability is not cumulative, but is alternative. Either the corporation is liable, or the corporators,—not both.²⁰⁶

²⁰⁴ *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776.

²⁰⁵ *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261; *Ang. & A. Corp. § 311*; *Central Ry. Co. v. Brewer*, 78 Md. 394, 28 Atl. 615; *Salt Lake City v. Hollister*, 118 U. S. 256-261, 6 Sup. Ct. 1055; *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597-608, 7 Sup. Ct. 1286; *Hamilton v. Railway Co.*, 53 N. Y. 25; *Jeffersonville Ry. Co. v. Rogers*, 38 Ind. 116; *Allen v. Railway Co.*, L. R. 6 Q. B. 65; *Goddard v. Railway*, 57 Me. 202; *Sherley v. Billings*, 8 Bush, 147; *Bryant v. Rich*, 106 Mass. 180; post, p. 138. Where an agent, authorized to issue stock when signed by the president, forges the name of the latter, and issues the stock, the corporation is liable. *Fifth Ave. Bank v. Forty-Second St. & G. St. F. R. Co.*, 137 N. Y. 231, 33 N. E. 378; *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338. Where an agent, by misrepresentation, induces a stockholder to exchange stock for trust certificates, the agent is liable personally, and not the corporation. *Manhattan Life Ins. Co. v. Forty-Second St. & G. St. F. R. Co.*, 64 Hun, 635, 19 N. Y. Supp. 90; *Tyler v. Savage*, 143 U. S. 79-99, 12 Sup. Ct. 340; *Aetna Life Ins. Co. v. Paul*, 37 Ill. App. 439.

²⁰⁶ *Harman v. Tappenden*, 1 East, 555; *Mill v. Hawker*, L. R. 9 Exch. 309; *King v. Watson*, 2 Term R. 199; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317. As to liability of promoters to stockholders, *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 29 Atl. 303.

SAME—MUNICIPAL AND QUASI MUNICIPAL CORPORATIONS.

47. Municipal corporations are sometimes, but not ordinarily, liable for their torts. Their liability depends largely upon construction of the legislation creating them. In general, they are not liable for

- (a) Conduct in performance of governmental, as distinguished from merely corporate, functions;**
- (b) Unauthorized conduct of officers and agents;**
- (c) Authorized acts.**

48. Involuntary quasi municipal corporations are subject to even a less extended liability for civil wrongs.

Acts in Performance of Governmental Functions.

A municipal corporation owes a two-fold duty,—one political, springing from its sovereignty; the other private, arising from its existence as a legal person. For conduct of its officers or agents in its former capacity, it is not liable; for their conduct in the latter, it is. As to what are public and governmental duties, and what are private or corporate duties, the courts are not in harmony, and their decisions do not furnish any definite line of cleavage. It is important, in every case, to determine the liability by a true interpretation of the statutes under which the corporation is created. Indeed, it may occur that the liability of a municipality depends exclusively on the statute.²⁰⁷

At one extreme, the exemption of municipal corporations from liability for torts is clear. Thus, they are not liable for damages consequent upon conduct of fire,²⁰⁸ police,²⁰⁹ health,²¹⁰ or public park

²⁰⁷ 2 Dill. Mun. Corp. § 948; *Reed v. City of Madison*, 83 Wis. 171, 53 N. W. 547; *Kollock v. City of Madison*, 84 Wis. 458, 54 N. W. 725; *Roberts v. City of Detroit*, 102 Mich. 64, 60 N. W. 450. And, generally, see *Bacon v. City of Boston*, 154 Mass. 100, 28 N. E. 9.

²⁰⁸ *Lawson v. City of Seattle*, 6 Wash. 184, 33 Pac. 347; *Wild v. Mayor, etc.*,

²⁰⁹ See note 209 on following page.

²¹⁰ See note 210 on following page.

departments, or for the exercise or nonexercise of a discretionary, legislative, or judicial power, as distinguished from a ministerial power.²¹¹

At the other extreme, municipalities are generally held liable for negligence,²¹² in construction, maintenance, or use of their streets,²¹³ sidewalks,²¹⁴ sewers,²¹⁵ and levees.²¹⁶ They are answerable in damages for trespass on private property.²¹⁷ While a city is not ordinarily liable for failure to exercise its corporate power to abate a nuisance of some third party doing damage,²¹⁸ it is responsible for wrongful exercise of power to abate a nuisance,²¹⁹ and for maintaining a nuisance, of its own.²²⁰

of *City of Paterson*, 47 N. J. Law, 406, 1 Atl. 490; *Dodge v. Granger*, 17 R. I. 664, 24 Atl. 100; *Grube v. City of St. Paul*, 34 Minn. 402, 26 N. W. 228.

²⁰⁹ *Elliott v. Philadelphia*, 75 Pa. St. 347; *Calwell v. Boone*, 51 Iowa, 687, 2 N. W. 614; *Odell v. Schroeder*, 58 Ill. 357; *Bowditch v. Mayor, etc., of Boston*, 101 U. S. 16; *City of Wilmington v. Vandegrift* (Del. Err. & App.) 29 Atl. 1047; *Van Hoosear v. Town of Wilton*, 62 Conn. 106, 25 Atl. 457. There is no liability on the part of a municipality for damages done by mobs. *Western College v. Cleveland*, 12 Ohio St. 375. Cf. *Darlington v. Mayor*, 31 N. Y. 164; *Lowell v. Wyman*, 12 Cush. (Mass.) 273; *In re Hall*, 5 Pa. St. 204.

²¹⁰ *Forbes v. Board of Health*, 28 Fla. 26, 9 South. 862.

²¹¹ *Lincoln v. City of Boston*, 148 Mass. 578, 580, 20 N. E. 329; *Hill v. City of Charlotte*, 72 N. C. 55. And, generally, see *City of Pontiac v. Carter*, 32 Mich. 164; *Griffin v. Mayor*, 9 N. Y. 456; *Dewey v. Detroit*, 15 Mich. 307; *Grant v. Erie*, 69 Pa. St. 420.

²¹² *Duthie v. Town of Washburn*, 87 Wis. 231, 58 N. W. 380.

²¹³ *City of Americus v. Chapman*, 94 Ga. 711, 20 S. E. 3; *Ledgerwood v. City of Webster* (Iowa) 61 N. W. 1089. But see *City of Detroit v. Blackeby*, 21 Mich. 84; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012; *Roberts v. City of Detroit*, 102 Mich. 64, 60 N. W. 450; *Hennessey v. City of New Bedford*, 153 Mass. 266, 26 N. E. 999. And, generally, see *Bieling v. City of Brooklyn*, 120 N. Y. 98, 24 N. E. 389; *Gerdes v. Foundry Co.* (Mo. Sup.) 27 S. W. 615; *Cleveland v. King*, 132 U. S. 295, 10 Sup. Ct. 90.

²¹⁴ *Reed v. City of Madison*, 83 Wis. 171, 53 N. W. 547; *Weare v. Fitchburg*, 110 Mass. 334; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; *Graham v. City of Albert Lea*, 48 Minn. 201, 50 N. W. 1108.

²¹⁵ *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1080; *New York Cent. & H. R. R. Co. v. City of Rochester*, 127 N. Y. 591, 28 N. E. 416; *Tate v. City of St. Paul*, 56 Minn. 527, 58 N. W. 158.

²¹⁶ *Barden v. City of Portage*, 79 Wis. 126, 48 N. W. 210.

²¹⁷ *Ashley v. Port Huron*, 35 Mich. 296. Cf. *Montgomery v. Gilmer*, 33 Ala. 116, with *Wilson v. City of New York*, 1 Denio (N. Y.) 595.

²¹⁸ *Davis v. Montgomery*, 51 Ala. 139.

²¹⁹ *Yates v. Milwaukee*, 10 Wall. 497; *Everett v. Council Bluffs*, 46 Iowa, 66. But see *City of Orlando v. Pragg*, 31 Fla. 111, 12 South. 368.

²²⁰ *Haag v. Board of County Com'rs*, 60 Ind. 511; *Miles v. City of Worcester*, 154 Mass. 513, 28 N. E. 676; *Pumpelly v. Canal Co.*, 13 Wall. 166-181; *Harper*

Between these extremes, the line of distinction is often obscure. Thus, as to corporate property, the municipality is not liable for damages arising from its use, management, or condition, when the purpose of such property is purely public. A child injured by an unsafe staircase in a public school cannot recover against the city.²²¹ Where, however, corporate property is not used for public, but for corporate, benefit, the city is liable for injury resulting. Thus, the city council of Augusta, as owner and keeper of a toll bridge over the Savannah river, was held liable for negligence in not keeping the abutments on the South Carolina side in safe condition. The corporation had gone into the state of South Carolina to engage in private business, and to enjoy the profits thereof.²²²

Same—Conduct Ultra Vires.

Municipal corporations can be held liable for only such tortious conduct as occurs in the exercise of some power conferred on them by law, or the exercise of some duty imposed on them by law. If conduct be unauthorized by charter or statute, it cannot be the basis of a suit for damages against them. Thus, cutting a ditch outside of the city limits is an act ultra vires, for which the city is not liable to the owner of the lot damaged.²²³ A municipality cannot commit libel.²²⁴

Unauthorized Acts of Agents and Officers.

A municipal corporation is not liable for the acts of its agents or officers, not previously authorized or subsequently ratified by it,

v. Milwaukee, 30 Wis. 365; *St. Peter v. Denison*, 58 N. Y. 416-421; *Mayor & City Council of Cumberland v. Willison*, 50 Md. 138; *Barthold v. Philadelphia*, 154 Pa. St. 109, 26 Atl. 304.

²²¹ *Hill v. Boston*, 122 Mass. 344; *Howard v. City of Worcester*, 153 Mass. 426, 27 N. E. 11; *Snider v. City of St. Paul*, 51 Minn. 466, 53 N. W. 763. But compare *Barron v. City of Detroit*, 94 Mich. 601, 54 N. W. 273; *Barthold v. Philadelphia*, 154 Pa. St. 109, 26 Atl. 304.

²²² *City Council v. Hudson*, 88 Ga. 599, 15 S. E. 678; *Doherty v. Inhabitants of Braintree*, 148 Mass. 495, 20 N. E. 106. Similarly, a city is liable where it operates waterworks as a private corporation might, *City of Philadelphia v. Gilmartin*, 71 Pa. St. 140; *Smith v. Philadelphia*, 81 Pa. St. 38.

²²³ *Loyd v. City of Columbus*, 90 Ga. 20, 15 S. E. 818; *City of Orlando v. Pragg*, 31 Fla. 111, 12 South. 368; *Mayor of City of Albany v. Cunliff*, 2 N. Y. 165; *Browning v. Owen Co.*, 44 Ind. 11-13; *Haag v. Board of Com'rs*, 60 Ind. 511; *City of Pekin v. Newell*, 26 Ill. 320; *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261-267, 27 N. E. 1030; *Smith v. City of Rochester*, 76 N. Y. 506; *Morrison v. Lawrence*, 98 Mass. 219.

²²⁴ *Howland v. Inhabitants of Maynard*, 159 Mass. 434, 34 N. E. 515.

nor done in good faith in pursuance of their general authority to act for the city in the matter to which they relate.²²⁵ Thus a city is not liable for the act of a tax collector in bringing a malicious suit against a person, unless it has authorized or ratified such suit.²²⁶ The ability of a municipal corporation to attach liability by ratification has been denied.²²⁷ The liability of a municipal corporation for the acts of an independent contractor or his servants is governed by essentially the same principles as apply in the case of private individuals.²²⁸

Damage Incident to Authorized Act.

A municipal corporation, on the same principles which exempt other corporations or private individuals, is not liable for damage incident to authorized act.²²⁹

Involuntary Quasi Municipal Corporations.

Involuntary quasi municipal corporations, such as counties,²³⁰ townships, school districts,²³¹ and the New England towns,²³² as to

²²⁵ Kreger v. Township of Bismarck, 59 Minn. 3, 60 N. W. 675. See Ehrgott v. Mayor, 96 N. Y. 264.

²²⁶ Horton v. Newell, 17 R. I. 571, 23 Atl. 910; New York & B. Sawmill & Lumber Co. v. City of Brooklyn, 71 N. Y. 580; Ham v. Mayor, etc., 70 N. Y. 459; Fisher v. Boston, 104 Mass. 87; Alcorn v. Philadelphia, 44 Pa. St. 348; Reilly v. Philadelphia, 60 Pa. St. 467; Sewell v. City of St. Paul, 20 Minn. 511 (Gil. 459); Chicago v. Joney, 60 Ill. 383.

²²⁷ Mitchell v. Rockland, 52 Me. 118-125. Cf. Ross v. Madison, 1 Ind. 281; Thayer v. Boston, 19 Pick. (Mass.) 511.

²²⁸ 2 Thomp. Neg. 740; Goetz v. Borough of Butler (Pa. Sup.) 3 Atl. 763; Borough of Susquehanna Depot v. Simmons, 112 Pa. St. 384, 5 Atl. 434; Shute v. Princeton Tp., 58 Minn. 337, 59 N. W. 1050; First Presbyterian Congregation of Easton v. Smith, 163 Pa. St. 561, 30 Atl. 279; Smith v. Board of County Com'rs, 46 Fed. 340.

²²⁹ Ante, p. 86.

²³⁰ In the absence of statutory provisions, a county is not liable for damages resulting from the failure of its officers to maintain its bridges. Pundman v. St. Charles Co., 110 Mo. 594, 19 S. W. 733. Cf. Field v. Albemarle Co. (Va.) 20 S. E. 954; Helgel v. Wichita Co., 84 Tex. 394, 19 S. W. 562. Cf. McCormick v. Washington Tp., 112 Pa. St. 185, 4 Atl. 164; Yordy v. Marshall Co., 80 Iowa, 405, 45 N. W. 1042; Krug v. Borough of St. Mary's, 152 Pa. St. 30, 25 Atl. 161, 162; People v. Board of Sup'rs, 142 N. Y. 271, 36 N. E. 1062.

²³¹ Finch v. Board of Education, 30 Ohio St. 37; Eastman v. Meredith, 36 N. H. 284; Kincaid v. Hardin Co., 53 Iowa, 430, 5 N. W. 589; Bank v. Brainerd School Dist., 49 Minn. 106, 51 N. W. 814.

²³² Wakefield v. Newport, 62 N. H. 624, collecting cases.

liability for torts, are distinguished from voluntary chartered municipal corporations proper, such as cities or incorporated villages, in being subjected to a much less extended responsibility. They are political divisions created for convenience, without the actual, immediate consent of the inhabitants of the territory involved.²³³

On the other hand, municipal corporations, properly speaking, are voluntary associations, to which there has been an actual, free consent on the part of the inhabitants. Moreover, the increased power of a municipal corporation proper naturally brings, at the same time, increased benefit and increased liability. And there is the additional argument from inconvenience,—that any other rule would bankrupt, for example, many sparsely-settled portions of the West.²³⁴ The validity of the distinction has been denied.²³⁵

SAME—CORPORATIONS, NOT MUNICIPAL, ENGAGED IN PUBLIC WORK.

49. Where a corporation, not municipal or quasi municipal, is engaged in public work,

- (a) Liability is determined by the rules applying to private corporations, whenever such works are operated for profit; and
- (b) Its exemption is limited by rules as to municipal corporations, when it is a public charity.

Public Works Engaged in for Profit.

The authorities are generally agreed that a private corporation owning public works, and operating them for profit, is liable in tort, as any other private corporation, for breach of corporate duty.

²³³ Russell v. Inhabitants of Devon Co., 2 Term R. 667. For a full discussion of the question, see opinion of Mr. Justice Gray, in Hill v. Boston, 122 Mass. 344.

²³⁴ Bailey v. Lawrence Co., 5 S. D. 393, 59 N. W. 219; Hollenbeck v. Winnebago Co., 95 Ill. 148.

²³⁵ Bailey v. Lawrence Co., 5 S. D. 393, 59 N. W. 219; Young v. City Council of Charleston, 20 S. C. 119; Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815; French v. City of Boston, 129 Mass. 592; Wilson v. Jefferson Co., 13 Iowa, 181; Commissioners of Baltimore Co. v. Baker, 44 Md. 1; House v. Board, 60 Ind. 580; Rapho Tp. v. Moore, 68 Pa. St. 404; Shadler v. Blair Co., 136 Pa. St. 488, 20 Atl. 539.

Thus, in *Parnaby v. Lancaster Canal Co.*,²³⁶ Tindall, C. J., held that the duty of taking such care of a canal that all who properly use it may navigate without danger to their lives or property is, by law, "imposed upon the company, and that they are responsible for the breach of it, upon a similar principle to that which makes a shop keeper who invites the public to his shop liable for neglect in leaving a trapdoor open, without any protection, by which his customers suffer injury." "The general rule," says Mr. Thompson,²³⁷ "is that when a corporation is clothed by charter, by the act of legislature, or by prescription which presumes a charter, with power to construct or improve turnpikes, plank roads, bridges, ferries, railways, telegraphs, canals, docks, wharves,²³⁸ waterworks, gasworks,²³⁹ to improve navigable streams, or to do other like work of a public nature, and to take toll therefor, it is bound to proceed in the construction and maintenance of such works with due regard to the safety of others, and to keep them in repair, and is liable in a civil action to an individual who has sustained damages in consequence of a failure of duty in either of these particulars."

Public Charity.

Following *Holliday v. St. Leonard*,²⁴⁰ it was held in Massachusetts²⁴¹ that a corporation established for the maintenance of a public charity is not liable for injury caused by its servants, if it exercises due care in their selection. In a later decision²⁴² the responsibility of public charity is determined upon a more logical principle,—that where the charity is performing a purely public duty, without profit, it is "no more liable for the negligence of officers and agents than the city would be." The reason for this better opinion

²³⁶ 11 Adol. & E. 223, 3 Nev. & P. 523, 3 Perry & D. 162; *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93.

²³⁷ Thomp. Neg. p. 555, citing cases. Although the duty is not especially enjoined by statute, *Kreider v. Lancaster, E. & M. Turnpike Co.*, 162 Pa. 537, 29 Atl. 721.

²³⁸ *Wendell v. Baxter*, 12 Gray (Mass.) 494.

²³⁹ See *Hague v. Wheeler*, 157 Pa. St. 324, 27 Atl. 714.

²⁴⁰ 11 C. B. (N. S.) 192.

²⁴¹ *McDonald v. Massachusetts General Hospital*, 120 Mass. 432. Cf. *Haas v. Missionary Soc.* (1893) 6 Misc. Rep. 281, 26 N. Y. Supp. 868.

²⁴² *Benton v. Boston City Hospital*, 140 Mass. 13, 1 N. E. 836.

is stated in *Fire Ins. Patrol v. Boyd*,²⁴³ by Mr. Justice Paxson, "that, when a public corporation has no property or funds but what have been contributed for a special charitable purpose, it would be against all law and all equity to apply the trust funds thus contributed to compensate injuries inflicted by the negligence of its agents and servants." This is the generally recognized rule.²⁴⁴

VARIATIONS BASED ON CONDUCT OF PLAINTIFF.

50. Plaintiff may deprive himself of the right to relief

- (a) By his own wrongdoing;
- (b) By his consent.

SAME—WRONGDOING BY PLAINTIFF.

51. The law will not interfere to do justice between, nor lend its aid to, those that have violated it. But, in order that plaintiff's wrongdoings shall bar his right to recover damages suffered at the hands of another, it must have been the legal cause of such damages.

52. While the mere fact that a person or his property are involved in wrongdoing does not create the duty on the part of another of exercising diligence to avoid doing harm, it does not justify the latter in

- (a) Malicious or wanton maltreatment, or in
- (b) Failing to take proper care to avoid harm after the latter has, or ought to have, knowledge of impending and avertible danger.

²⁴³ 120 Pa. St. 624, 15 Atl. 553; *Boyd v. Insurance Patrol*, 113 Pa. St. 209, 6 Atl. 536.

²⁴⁴ *Sproat v. Directors*, 145 Pa. St. 598, 23 Atl. 380; *Van Tassell v. Hospital*, 60 Hun, 585, 15 N. Y. Supp. 620; *Laubhelm v. Steam Ship Co.*, 107 N. Y. 228, 13 N. E. 781; *Maxmillian v. Mayor*, 62 N. Y. 160; *Richardson v. Coal Co.*, 6 Wash. 52, 32 Pac. 1012; *Williamson v. Industrial School*, 95 Ky. 251, 24 S. W. 1005; *Murtaugh v. St. Louis*, 44 Mo. 479. But see *Glavin v. Hospital*, 12 R. I. 411. As to what is a public charity, see *Fire Ins. Patrol v. Boyd*, supra; Phil-

It is often said that a man cannot sue for any injury suffered by him at a time when he is himself a wrongdoer. But the statement is too broad. There is no such general rule of law. The true principle seems to be that the plaintiff is disabled from recovering only when his wrongdoing is the legal cause of his damage. It is not sufficient for the defendant to show merely that at the time the plaintiff was violating the law. Mere violation of the law, or wrongdoing in some particular, does not make the offender an outlaw.²⁴⁵ Thus, because one may have been riding a horse faster than an ordinance allowed, or because a boatman in a shell, or a student after a football game, may have been so insufficiently clad as to be guilty of indecent exposure, third persons are not justified in stoning him, as a violator of the law, nor would his wrong prevent his recovery from them.²⁴⁶ The fact that a person was drunk at the time of his injury will not prevent his recovery, unless his condition is connected as the cause of his suffering.²⁴⁷ Contributory negligence on the part of the plaintiff will bar his recovery of damages only when it is the legal cause of the harm.²⁴⁸ But wherever one has violated the law, and such violation contributes directly or approximately to his alleged injury, he has never been permitted to recover for it.²⁴⁹ Such an unlawful act is not merely evidence of

Philadelphia v. Masonic Home, 160 Pa. St. 572, 28 Atl. 954; *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 25 Atl. 55; *Northampton Co. v. Lafayette College*, 128 Pa. St. 132, 18 Atl. 516; *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Gooch v. Association*, 109 Mass. 558.

²⁴⁵ *Norris v. Litchfield*, 35 N. H. 271; *Turner v. Railroad Co.*, 63 N. O. 522-526.

²⁴⁶ *Maguire v. Middlesex Ry. Co.*, 115 Mass. 239; *Averill v. Chadwick*, 153 Mass. 171, 26 N. E. 441.

²⁴⁷ *Ward v. Chicago, St. P., M. & O. Ry. Co.*, 85 Wis. 601, 55 N. W. 771; *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534. So one may not willfully run another down, though he be trotting for money contrary to statute. *Welch v. Wesson*, 6 Gray, 505; *Norris v. Litchfield*, 35 N. H. 271.

²⁴⁸ Post, p. 489, "Contributory Negligence"; *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184.

²⁴⁹ "It will defeat an action for tort if the injured party, in making his case, must show that he was at the time of the injury violating a positive statute, or committing malum in se, provided such violation of law or crime contributed to the injury." Taft, C. J., in *Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co.*, 9 C. C. A. 314, 60 Fed. 993-998.

contributory negligence, but is a conclusive bar to recovery. A plaintiff's violation of law, therefore, should not be discussed in connection with the exercise of due care, but treated from the point of view of connection as cause.

"It is a rule not confined to actions on contracts that 'the plaintiff cannot recover where, in order to maintain his supposed claim, he must set up an illegal agreement to which he himself has been a party';²⁵⁰ but its application to actions of tort is not frequent or normal."²⁵¹ If one cannot make out his case without showing part taken by him in an unlawful civil transaction, he is denied judicial redress. One wrongdoer can have no right against another.²⁵² Thus, a fraudulent transaction, in which both parties have knowingly participated, will not support a judgment for the plaintiff, nor a judgment for affirmative relief for the defendant.²⁵³ The law will neither apportion damages nor reimburse those who willfully join in wrongdoing.²⁵⁴

As to how far what Mr. Bishop felicitously calls "collateral wickedness" will prevent one who travels on Sunday, not for "works of necessity or charity," from recovering for wrong done him, is much in dispute. On the one hand, it is held that the law will not lend its assistance to one violating it, that failure to comply with statutory requirements is a species of negligence, and that, therefore, the law will deny redress to any one engaged in such violation.²⁵⁵ On the

²⁵⁰ *Maul, J.*, in *Fivaz v. Nicholls*, 2 C. B. 501, 512. See *Kitchen v. Greenbaum*, 61 Mo. 110.

²⁵¹ *Pol. Torts*, p. 118.

²⁵² No action lies for pirating a libelously immoral book. *Stockdale v. Onwhyn*, 5 Barn. & C. 173, 2 Car. & P. 163; *Turley v. Tucker*, 6 Mo. 583; *Stepherson v. Little*, 10 Mich. 434; *Winship v. Neale*, 10 Gray, 382; *Ridgely v. Bond*, 17 Md. 14; *Hurd v. Fleming*, 34 Vt. 169; *Muggridge v. Eveleth*, 9 Metc. (Mass.) 233; *Ransom v. State*, 22 Conn. 153; *Putnam v. Wyley*, 8 Johns. (N. Y.) 337.

²⁵³ *Buchtella v. Stepanek*, 53 Kan. 373, 36 Pac. 749. Et vide *Peacock v. Terry*, 9 Ga. 137. And, generally, see *Northwestern Mut. Life Ins. Co. v. Elliott*, 5 Fed. 225; *Thomas v. Brady*, 10 Pa. St. 164.

²⁵⁴ *Lyndhurst, C. B.*, in *Colburn v. Patmore*, 1 Crompt., M. & R. 73, 83.

²⁵⁵ *Bucher v. Fitchburg R. Co.*, 131 Mass. 156; *Davis v. Somerville*, 128 Mass. 594; *Bosworth v. Swansey*, 10 Metc. (Mass.) 363; *Jones v. Andover*, 10 Allen, 18; *McGrath v. Merwin*, 112 Mass. 467; *Connolly v. Boston*, 117 Mass. 64; *Smith v. Boston & M. R. Co.*, 120 Mass. 490; *Day v. Highland St. Ry.*

other hand, it is urged, with apparent weight of reason and authority, that the wrong of a railroad, in not furnishing safe machinery, proper servants, and the like, or the wrong of a municipality, in neglecting to repair its streets, being disconnected from the wrong of the person who may elect to travel on Sunday, is the juridical cause of the injury, and that denial of the right to recover would encourage negligence and multiply accidents;²⁵⁶ that mere proximity in time is no part of the definition of "proximate cause"; and that the wrong is to the state, without breach of any duty to the injured plaintiff.²⁵⁷

Wanton Injury.

The mere fact that a person has violated the law may not prevent him from recovering for a subsequent wrong done him,²⁵⁸ but he does not stand on the same footing as an innocent person. Thus, no duty of diligence is owed to a trespasser, intruder, mere volunteer, or bare licensee. Such a person cannot recover under circumstances which would entitle a person lawfully in the same position to maintain an action for damages suffered.²⁵⁹ Therefore, if a trespassing person, of full age, a child,²⁶⁰ or an animal runs into a barrier, excavation.

Co., 135 Mass. 113. The Massachusetts rule was changed by St. 1884, c. 37. Cf. reasoning of Massachusetts cases with that found in *Olesen v. City of Plattsmouth*, 35 Neb. 153, 52 N. W. 848; *Cratty v. City of Bangor*, 57 Me. 423; *Johnson v. Town of Irasburgh*, 47 Vt. 28.

²⁵⁶ *Sutton v. Town of Wauwatosa*, 29 Wis. 21; *McArthur v. Green Bay & Mississippi Canal Co.*, 34 Wis. 139; *Platz v. Cohoes*, 89 N. Y. 219; *Schmid v. Humphrey*, 48 Iowa, 652.

²⁵⁷ *Sutton v. Town of Wauwatosa*, supra. Et vide *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; *Platz v. Cohoes*, 89 N. Y. 219; *Johnson v. Missouri Pac. Ry. Co.*, 18 Neb. 690, 26 N. W. 347. On the same principle, it is no defense to an action for negligent shooting that at the time of the injury plaintiff and defendant were unlawfully engaged in shooting on the Sabbath. *Gross v. Miller* (Iowa) 61 N. W. 385.

²⁵⁸ *Ogden v. Claycomb*, 52 Ill. 365.

²⁵⁹ *Nave v. Flack*, 90 Ind. 205; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375 (cf. *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 461); *Rosenbaum v. St. Paul & D. R. Co.*, 38 Minn. 173, 36 N. W. 447; *Tonawanda R. Co. v. Munger*, 49 Am. Dec. 239; *McVeety v. St. Paul, M. & M. Ry. Co.*, 45 Minn. 268, 47 N. W. 800; *Kirtley v. Railway Co.*, 65 Fed. 386; *Lary v. Cleveland, C., C. & I. R. Co.*, 78 Ind. 323.

²⁶⁰ *Rodgers v. Lees*, 140 Pa. St. 475, 21 Atl. 399; *Mitchell v. New York, L. E. & W. R. Co.*, 146 U. S. 513, 13 Sup. Ct. 259; post, p. 467, "Negligence."

or other source of danger, there is no actionable wrong. The owner of the premises is not bound to provide safeguards.²⁶¹

Merely that a man is a trespasser does not justify another in recklessly or wantonly doing damage to him.²⁶² Therefore, if a claimant of real estate, out of possession, resorts to force and violence amounting to a breach of peace, to obtain possession from another claimant, in peaceable possession, and personal injury arises thereupon to the latter, the former is liable in damages for the injury, without regard to the legal title, or right of possession.²⁶³ In a similar manner, a trespasser may recover for damages done him by a spring gun.²⁶⁴

Negligent Injury.

Knowledge of peril to a wrongdoer may require the exercise on the part of the defendant of diligence to avoid harm. Thus, in what is called an extreme case,²⁶⁵ a man so drunk as to be helpless, mentally and physically, was put off a railroad train by a conductor, who knew his condition. The passenger was severely frozen, and the company was held liable.²⁶⁶ With respect even to a trespasser, for example, on a railroad track, the company is bound to exercise proper care to warn and to avoid striking such a person after its servants on the engine know the dangerous situation, although the company

²⁶¹ *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 368; *Maynard v. Boston & M. R. Co.*, 115 Mass. 458; *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. 699; *Blatt v. McBarron*, 161 Mass. 21, 36 N. E. 468; *Mergenthaler v. Kirby*, 79 Md. 182, 28 Atl. 1065; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255; *Knight v. Abert*, 6 Pa. St. 472. But see *Barnes v. Ward*, 9 C. B. 392-420. Compare *Howland v. Vincent*, 10 Metc. (Mass.) 371, with *Birge v. Gardner*, 19 Conn. 507.

²⁶² *Planz v. Boston & A. R. Co.*, 157 Mass. 377, 32 N. E. 356; *Phillips v. Wilpers*, 2 Lans. (N. Y.) 389.

²⁶³ *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, approved *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101-107, 13 Sup. Ct. 261; *Ogden v. Claycomb*, 52 Ill. 365; *Trogden v. Henn*, 85 Ill. 237.

²⁶⁴ *Bird v. Holbrook*, 4 Bing. 628; *Hooker v. Miller*, 37 Iowa, 613. And see *Aldrich v. Wright*, 53 N. H. 398; *Churchill v. Hulbert*, 110 Mass. 42; *Maynard v. Railroad Co.*, 115 Mass. 458.

²⁶⁵ *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179-185, 6 N. E. 310, and 10 N. E. 70. And see *Lary v. Cleveland, C., C. & I. R. Co.*, 78 Ind. 323.

²⁶⁶ *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624; *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877.

is not bound to keep a lookout for the benefit of trespassers.²⁶⁷ And if the jury should find that after the discovery of such position the company, or its servant, could have avoided the damage complained of, but negligently failed to do so, the trespasser may maintain his action for consequent damages.²⁶⁸ On the same principle, the mere fact that property was used for gambling purposes only is no defense to an action for a negligent injury to it.²⁶⁹

SAME—CONSENT.

53. No action can be maintained for damages resulting from conduct suffered by consent. But this exemption is limited

- (a) To cases involving consent as distinguished from mere knowledge, and the exercise of option as distinguished from compulsion; and
- (b) To cases coming within the limits fixed by the person assenting and permitted by law.

After a tort has been committed, the sufferer may waive it; may accept something in satisfaction of it, and then release it. Consent after the wrong may bar action. On the same principle, before the damage is done the person who endures the harm may, by his consent, put himself in such a position that he cannot complain. Harm suffered by consent is not, in general, the basis of a civil action. This is the meaning of the maxim, "*Volenti non fit injuria*." The English phrase is, "Leave and license." Accordingly, if one person procure another to publish defamatory matter concerning him, he

²⁶⁷ *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 518, 21 N. W. 711; *Planz v. Boston & A. R. Co.*, 157 Mass. 377, 32 N. E. 356; *Brown v. Lynn*, 31 Pa. St. 510; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393, and cases cited; *Baltimore Traction Co. v. Wallace*, 77 Md. 435, 26 Atl. 518; *Louisville & N. R. Co. v. Kellem's Adm'x* (Ky.) 21 S. W. 230; *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665; *Hepfel v. St. Paul, M. & M. Ry. Co.*, 49 Minn. 263, 51 N. W. 1049; *Haden v. Sioux City & P. R. Co.* (Iowa) 60 N. W. 537. So as to cattle running at large. *Johnson v. Minneapolis & St. L. Ry. Co.*, 43 Minn. 207, 45 N. W. 152. But see *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227.

²⁶⁸ *Wallace v. City & Suburban Ry. Co.*, 26 Or. 174, 37 Pac. 477.

²⁶⁹ *Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Civ. App.) 25 S. W. 1015.

cannot afterwards sue therefor.²⁷⁰ So, where a person under lawful arrest, at his own request, is confined in a jail other than that specified by law, he cannot recover for false imprisonment.²⁷¹

Consent to commit what would otherwise be trespass carries with it exemption from the necessary results of what was consented to.²⁷² Where one impliedly or expressly invites or permits another to come upon his premises, or to use his premises in a way otherwise wrongful, he cannot complain of such conduct as a trespass.²⁷³ On the same principle, risk may be assumed. The consent thus involved may bar right of action. A man who unnecessarily goes, or sends his dog, where he is advised there are dangers, like a spring gun, does so at his peril.²⁷⁴

Knowledge and Option.

Mere knowledge is not consent. If one both know of a danger or of a wrong, and then willingly, without duress, consent to it, he cannot be heard to claim damages consequent upon this conduct; but if he merely had knowledge, without either appreciation of risk, or opportunity to exercise an option, the maxim cannot be applied to him. There is no actual breach of a duty if the person injured, knowing and appreciating the danger, voluntarily elects to encounter it. There may, however, be knowledge of risk without appreciation of danger.²⁷⁵ Where the injured party can take his option to do or not to do a given thing, and is not subject to physical constraint, he has been held to do it voluntarily.²⁷⁶ But one who, in an exigency, de-

²⁷⁰ *Howland v. Manufacturing Co.*, 156 Mass. 543, 570, 571, 31 N. E. 656.

²⁷¹ *Ellis v. Cleveland*, 54 Vt. 437.

²⁷² Thus consent to use land for right of way carries with it consent to drain or overflow land in the proper use of the right of way. *Updegrove v. Pennsylvania S. V. R. Co.*, 132 Pa. St. 540, 19 Atl. 283. But not to be negligent in construction or maintenance of right of way. *McMinn v. Pittsburgh, M. & Y. R. Co.*, 147 Pa. St. 5, 23 Atl. 325.

²⁷³ *Sweetser v. Boston & M. R. Co.*, 66 Me. 583; *Churchill v. Baumann*, 104 Cal. 369, 36 Pac. 93, and 38 Pac. 43; *Searing v. Saratoga*, 39 Hun, 307.

²⁷⁴ *Jordin v. Crump*, 8 Mees. & W. 781; *Galbraith v. Fleming*, 60 Mich. 403, 27 N. W. 581; *Champer v. State*, 14 Ohio St. 437; *State v. Beck*, 1 Hill (S. C.) 363; *Illinois Cent. Ry. Co. v. Allen*, 39 Ill. 205; *Walker v. Fitts*, 24 Pick. 191; *Com. v. Parker*, 9 Metc. (Mass.) 263.

²⁷⁵ *Thomas v. Quartermaine*, 18 Q. B. Div. 685; post, p. 516.

²⁷⁶ Lord Bramwell, in *Membery v. Great Western Ry. Co.*, 14 App. Cas. 179.

termines to take a risk is not held so strictly.²⁷⁷ Consent to a wrong, induced by fraud, duress, or conspiracy, is no answer to an action upon the wrong by the party so consenting against the party so procuring the assent.²⁷⁸

Consent Limited by Parties.

Where one person has consented to conduct on the part of another, which but for such consent would be a tort, the conduct must fall within the limit of such consent, or liability will attach. Here is applied the general principle that, the authority ceasing, the exemption from liability ceases.²⁷⁹ Thus, participants in a violent game have assumed the risk ordinarily incident to their sport, but such ordinary risk does not include wrongful and intentional inflictions of injury.²⁸⁰ Being a mere onlooker, moreover, does not make one a participant. Accordingly, the unwilling victim of a college rush line can recover for assault.²⁸¹ Consent to the performance of a surgical operation for the cure or extirpation of disease will, in the law, justify the use of force; but such consent does not prevent suit by the patient for intentional violence or negligence on the part of the physician to his patient.²⁸² Consent is sufficient, however reluctantly it may be given.²⁸³

Consent Limited by Law.

The exemption based on consent is not only thus limited by the parties themselves, but, notwithstanding the actual consent to a

Dissenting opinion in *Eckert v. Long Island Ry. Co.*, 43 N. Y. 502-506. A voluntary spectator at a display of fireworks consents to it, and cannot recover for injuries caused by an explosion. *Scanlon v. Wedger*, 156 Mass. 462, 31 N. E. 642.

²⁷⁷ *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 20 N. E. 464; *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119.

²⁷⁸ *Johnson v. Girdwood*, 7 Misc. Rep. 651, 28 N. Y. Supp. 151.

²⁷⁹ Consent to operate a threshing machine with a damper down does not prevent recovery for damage caused by operating with the damper open in a high wind. *Garrison v. Graybill*, 52 Mo. App. 580.

²⁸⁰ *Fitzgerald v. Cavin*, 110 Mass. 153.

²⁸¹ *Markley v. Whitman*, 95 Mich. 236, 54 N. W. 763.

²⁸² Consent that a physician should conduct an autopsy at a tomb is not a license to remove any part of the remains,—for example, the skull. *Palmer v. Broder*, 78 Wis. 483, 47 N. W. 744.

²⁸³ *Latter v. Braddell*, 50 Law J. Q. B. 448.

wrong, the law may still allow recovery by the injured one. There are limits to lawful consent. The law does not recognize consent to conduct unlawful, or forbidden by positive law, or for doing that to which a penalty is attached and announced. Principals in a prize fight may sue each other for damages done in the battle.²⁸⁴ Consent does not justify assault.²⁸⁵ Consent to the exercise of physical force will not justify causing, or endeavoring to cause, appreciable bodily harm for the mere pleasure of the parties.

But where "the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauching of a man's wife or daughter, slander, libel, or trespass on his real estate or to his personal property, agreement, consent or license is a good defense."²⁸⁶ Seduction, however, is as much forbidden by positive law as is assault. Perhaps the true distinction is that a man cannot consent to do anything which is a breach of public duty. An assault is a breach of the peace. Seduction, however, while it may be punished as a crime, involves personal, rather than public, duty. Therefore, neither the husband nor the father, nor the woman herself, who expressly or impliedly consents to that wrong, may recover for seduction.²⁸⁷ It is otherwise, however, where the father and husband are innocent.²⁸⁸

²⁸⁴ *Boulter v. Clark*, Bull, N. P. 16 (per Parker, C. B.); *White v. Barnes*, 112 N. C. 323, 16 S. E. 922; *Dole v. Erskine*, 35 N. H. 503; *Grotton v. Gilden*, 84 Me. 589, 24 Atl. 1008; *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473; *Adams v. Waggoner*, 33 Ind. 531; *Logan v. Austin*, 1 Stew. (Ala) 476; *Bell v. Hansley*, 3 Jones (N. C.) 131; *Evans v. Waite*, 83 Wis. 286, 53 N. W. 445; *Jones v. Gale*, 22 Mo. App. 637; *Smith v. Simon*, 69 Mich. 481, 37 N. W. 548. But a voluntary fighter cannot recover unless defendant beat him unreasonably or excessively. *Galbraith v. Fleming*, 60 Mich. 403, 27 N. W. 581. "The supreme court of Louisiana has thrown its protection about the great New Orleans industry of prize fighting." 7 Green Bag, 98, commenting on *State v. Olympic Club*, 46 La. Ann. 935, 15 South. 190.

²⁸⁵ *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630; *Christopherson v. Bare*, 11 Q. B. 473.

²⁸⁶ *Adams v. Waggoner*, 33 Ind. 531; *Com. v. Collberg*, 119 Mass. 350; *McCue v. Klein*, 60 Tex. 168; *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473.

²⁸⁷ *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185; 4 Am. St. Rep. 535, note, quoting *Cooley, Torts*, § 163; *Hamilton v. Lomax*, 26 Barb. 615.

²⁸⁸ *Felt v. Amidon*, 43 Wis. 467; *Lunt v. Philbrick*, 59 N. H. 59; *Pence v. Dozier*, 7 Bush (Ky.) 133; *Hudkins v. Haskins*, 22 W. Va. 645; *Bennett v. Allcott*, 2 Term R. 166.

CHAPTER III.**LIABILITY FOR TORTS COMMITTED BY OR WITH OTHERS.**

- 54. In General.
- 55. Concert in Action—Joint Tort Feasors.
- 56. Liability of Joint Tort Feasors.
- 57. Contribution between Joint Tort Feasors.
- 58. Relationship.
- 59-60. Husband and Wife.
- 61. Landlord and Tenant.
- 62-63. Independent Contractor.
- 64. Master and Servant.
- 65. Master's Liability to Third Persons.
- 66. Existence of Relation.
- 67. Liability by Consent.
- 68-69. Liability Independent of Consent.
 - (a) The Servant's Conduct.
 - (b) The Master's Duty.
- 70-71. Reason of Liability.
- 72. Independent Torts.
- 73. Master's Liability to Servant.
- 74. Servant's Liability to Servant.
- 75-78. Liability of Servant to Master.
- 79. Liability of Servant to Third Person.
- 80. Partners.

IN GENERAL.

- 54. Liability for torts committed by or with others is dependent on either**
- (a) Concert in action, in which case the parties are joint tort feasors; or
 - (b) Relationship.

CONCERT IN ACTION—JOINT TORT FEASORS.

- 55. Where two or more persons participate in concerted action to commit a common tort, they are called "joint tort feasors."**

There are several classes of cases wherein joint responsibility arises. In one class, the responsibility arises from relationship; as where a husband and wife are held jointly liable for the wife's torts, or as where the master is held liable for the acts of his servant, the principal for his agent, the employer for his employé, and the partner for his copartner. In another class, two or more persons may be held liable because of personal participation, by consent to, or actual commission of, the wrong complained of; as where several persons execute a conspiracy to assault, steal from, or defraud another. Such persons are commonly called "joint tortfeasors." These two classes often overlap. Husband and wife,¹ master and servant,² and partners may actually join in wrongdoing. Then the liability is because of personal commission or consent (or command), not because of relationship.

By way of distinction, joint tortfeasors are held responsible, not because of any relationship existing between them, but because of concerted action towards a common end.

Thus, where one of a firm, in the name of the others, wrongfully ejected a tenant, they being only sureties for the payment of his rent, but the act being clearly not in the ordinary course of business, the one partner had no power to bind the firm or involve the others in the mischief. The question, therefore, had to be determined, did all or any of the partners fall within the above definition by consenting to the act? for the firm was not liable, but only those members who had consented to the act.³

All persons who aid, counsel, direct, or join in committing a tort are joint tortfeasors.⁴ The liability of a joint tortfeasor may attach by direct participation. Thus, where one person carries away

¹ Post, p. 125, "Husband and Wife."

² As to master and servant, see *Wright v. Willcox*, 19 Wend. 343; *Blake v. Ferris*, 5 N. Y. 48; post, p. 138, "Master and Servant."

³ *Petrie v. Lamont*, Car. & M. 93. And see *Moreton v. Hardern*, 4 Barn. & C. 223; *Grund v. Van Vleck*, 69 Ill. 479.

⁴ *Tindel, C. J.*, in *Petrie v. Lamont*, Car. & M. 93-96; *Hyde v. Cooper*, 26 Vt. 552. Traffic association: *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412. As to judge and officer of court, attorney of record, and execution creditor, see *Baker v. Secor*, 51 Hun, 643. 4 N. Y. Supp. 303; *Zeller v. Martin*, 84 Wis. 4, 54 N. W. 330. Sheriff and attaching creditor: *Harris v. Tenney*, 85 Tex. 254, 20 S. W. 82; *Blakely v. Smith* (Ky.) 26 S. W. 584. Joint trespassers:

a package of goods, while another is putting up a different package, which both take off together, they are jointly liable.⁵ Or the liability may arise out of counsel, direction, or command by one to another to commit a tort.

Mere presence at the commission of a wrong, as an assault, does not attach liability as principal;⁶ but encouraging, inciting, and even presence without disapproval, in connection with other circumstances, may have that effect.⁷ It is in this sense that those conspirators who do not actually commit a wrong are tort feorsors.⁸ The liability of joint tort feorsors may arise out of ratification of an action done for a party's benefit although without his authority.⁹

Nor is mere similarity of design or conduct on the part of independent actors sufficient to constitute such actors joint tort feorsors.¹⁰ If a wrong be jointly done,—that is, in concert,—the defendants are joint tort feorsors; if it be severally done,—that is, independently, though for a similar purpose and at the same time,—without any concert of action, they are several tort feorsors.¹¹ An action will not lie against two persons jointly for slander. The words of one are not the words of another, and the injury resulted from words only.¹² So, where a libel has been successively repeated by several persons, an action will lie against each of those who cir-

Whitney v. Backus, 149 Pa. St. 29, 24 Atl. 51; *Wilbur v. Turner*, 39 Ill. App. 526.

⁵ *Harris v. Rosenberg*, 43 Conn. 227; *Colegrove v. Railroad Co.*, 6 Duer, 382.

⁶ *Hilmes v. Stroebel*, 59 Wis. 74, 17 N. W. 539.

⁷ *Willi v. Lucas*, 110 Mo. 219, 19 S. W. 726.

⁸ Post, p. 364, "Conspirators"; *Cheney v. Powell*, 88 Ga. 629, 15 S. E. 750.

⁹ See ante, p. 40.

¹⁰ *Clark & L. Torts*, 43, comparing *Hume v. Oldacre*, 1 Starkle, 351, with *Paget v. Birkbeck*, 3 Fost. & F. 683.

¹¹ *Williams v. Sheldon*, 10 Wend. 654; *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550; *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 48 N. W. 1000; *Gallagher v. Kemmerer*, 144 Pa. St. 509, 22 Atl. 970; *Little Schuylkill Nav. R. & C. Co. v. Richard's Adm'r*, 57 Pa. St. 142; *Chipman v. Palmer*, 77 N. Y. 51; *Slater v. Mercereau*, 64 N. Y. 138. But, to constitute defendants joint tort feorsors, there must be community of wrong,—concert of action. *Bennett v. Fifield*, 13 R. I. 139. Cf. *Chipman v. Palmer*, 77 N. Y. 51, with *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911; *Dooley v. Seventeen Thousand Five Hundred Head of Sheep (Cal.)* 35 Pac. 1011.

¹² *Patten v. Gurney*, 17 Mass. 182-186.

culated it. They are several, not joint, tortfeasors.¹³ None the less, ordinarily, both parties guilty of concurrent negligence may be sued jointly, though they had no common purpose and though there was no concert in action.*

SAME—LIABILITY OF JOINT TORT FEASORS.

56. Each, any, or all joint tortfeasors are responsible in compensatory damages for joint wrongs without regard to degree of culpability or extent of participation.

The person injured by joint tortfeasors may sue and recover against all, any number, or only one of them.† The liability is joint and several.¹⁴ Indeed, he may bring different forms of action against different participants—trespass against one, trover against another, and so on.¹⁵ The law does not recognize degrees of culpability between wrongdoers, and will not apportion compensatory damages between them. They are alike guilty and alike responsible.¹⁶ But while the sufferer may proceed separately against all tortfeasors who injured him, or against them all jointly, he must elect to

¹³ *Martin v. Kennedy*, 2 Bos. & P. 69; *Nicoll v. Glennie*, 1 Maule & S. 588–592.

* *Flaherty v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 328, 40 N. W. 160. As in a railroad collision: *Colegrove v. Railroad Co.*, 20 N. Y. 492. And see *Slater v. Mersereau*, 64 N. Y. 138.

† *Merryweather v. Nixan*, 8 Term R. 186; *Chaffee v. U. S.*, 18 Wall. 516; *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412; *Slater v. Mersereau*, 64 N. Y. 138; *Bryant v. Carpet Co.*, 131 Mass. 491; *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. St. 187.

¹⁴ *Mitchell v. Tarbutt*, 5 Term R. 649, cited in *McAvoy v. Wright*, 137 Mass. 207. Cf. *Stone v. Dickinson*, 5 Allen, 29 (as in nuisance); *Irvine v. Wood*, 51 N. Y. 224; *Slater v. Mersereau*, 64 N. Y. 138; *Klauder v. McGrath*, 35 Pa. St. 128; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799.

¹⁵ *Lovejoy v. Murray*, 3 Wall. 1; *Creed v. Hartmann*, 29 N. Y. 591; *Peoria v. Simpson*, 110 Ill. 294; *State v. Babcock*, 42 Wis. 138.

¹⁶ *Warren v. Westrup*, 44 Minn. 237, 46 N. W. 347; *Keegan v. Hayden*, 14 R. I. 175; *Post v. Stockwell*, 34 Hun, 373; *Huddleston v. West Bellevue*, 111 Pa. St. 110, 2 Atl. 200; *Price v. Harris*, 10 Bing. 331, 25 E. C. L. 159; *Albright v. McTighe*, 49 Fed. 817; *Hill v. Goodchild* (1771) 5 Burrows, 2790; *Halsey v. Woodruff*, 9 Pick. 555.

pursue one course or the other; and, having made his election, he is bound by it. If he sues all jointly and has judgment, he cannot afterwards sue them separately; or if he sues separately and has judgment, he cannot afterwards sue them in a joint action. The prior judgment against one is an election as to that one to pursue his several remedy; but it is ordinarily, in America, no bar to the suit for the same wrong against any one or more of the other wrongdoers.¹⁷

SAME — CONTRIBUTION BETWEEN JOINT TORT FEASORS.

57. There can be no contribution between joint tortfeasors except when they neither knew nor are presumed to have known that a legal wrong was being done.

In cases where the wrongdoers actually intend to do an unlawful act, or where they are presumed to know that they were doing an unlawful act, there is neither indemnity nor contribution between them. Thus, if the owner of premises leave a hatchway on the street open and unguarded, and is compelled to pay damages to a traveler injured thereby, he cannot recover indemnity of another person who may have interfered with the hatchway so as to make it more dangerous.¹⁸ Where, however, joint tortfeasors in committing the tort do what is apparently lawful, in the belief that they are pursuing a lawful course, and the wrong inflicted upon another arises out of this conduct by construction or inference of the law, and is not the foreseen result of a wrongful act, the law will allow contribution between them. In many instances several parties may be liable in law to the person injured, while as between themselves some of them are not wrongdoers at all; and the equity of the guiltless to require the actual wrongdoer to respond for all damages, and the equally innocent to contribute his portion, is complete.¹⁹ Indeed,

¹⁷ The Atlas, 93 U. S. 302.

¹⁸ Churchill v. Holt, 131 Mass. 67. Cf. Id., 127 Mass. 165.

¹⁹ Carpenter, J., in Nashua Iron & Steel Co. v. Worcester & N. R. Co., 62 N. H. 159; Avery v. Halsey, 14 Pick. 174; Gray v. Boston Gaslight Co., 114 Mass. 149; Churchill v. Holt, 127 Mass. 165, 131 Mass. 67; Armstrong Co. v. Clarion Co., 66 Pa. St. 218.

the rule as to no contribution has so many exceptions that it can hardly with propriety be called a general rule.²⁰

RELATIONSHIP.

58. Liability by reason of relationship will be considered under the following heads:

- (a) Husband and wife.
- (b) Landlord and tenant.
- (c) Independent contractor.
- (d) Master and servant.
- (e) Partners.

SAME—HUSBAND AND WIFE.

59. The common-law limitation as to the status of married women led to two principal consequences, so far as the law of torts is concerned:

- (a) Inability of wife to sue or be sued in tort, and to the sole responsibility of her husband for torts committed by her before or after marriage, in an action in which she was joined with him as a party defendant, ordinarily, but not invariably, and to his sole right to recover for any tort committed against her.
- (b) The use of coverture as a defense to a cause of action really based on contract, but attempted to be enforced through the form of an action *ex delicto* to avoid her exemption from liability for her contract.

Liability at Common Law for Torts of Wife.

At common law the personality of a married woman was merged in that of her husband. Man and wife were one, and the man was that one. Therefore, even after a divorce, she could not sue him for a tort committed against her, e. g. for assault and battery.²¹

²⁰ *Bailey v. Bussing*, 28 Conn. 455; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159.

²¹ *Abbott v. Abbott*, 67 Me. 304; *Phillips v. Barnet*, 1 Q. B. Div. 436.

All her property became his,—so did her debts. Her husband was held responsible for her torts whether committed before or after marriage.²² Indeed, he might even have been arrested for his wife's tort.²³ It was impossible for the wife during coverture to be either sole plaintiff or sole defendant in actions *ex delicto*, and by reason of this rule the husband was joined for conformity. It would seem there was doubt whether he was joined because he was liable, or whether this joinder made him liable to pay damages and cost of suit. But in either case it did not make him a tortfeasor, either sole or joint, nor give any cause of action against him alone. If the wife died, the action abated; and, if the action was brought after sentence of divorce was pronounced, the husband could not have been joined.²⁴ If the husband died, the wife could then be sued as *feme sole*. The husband, however, was liable for property converted by her alone, because the converted property necessarily became his, and the conversion was deemed to be for his use, and he could have been sued alone. Indeed, it appears that, even if the conversion had been the result of the joint act of both, he could have been sued alone.²⁵ When torts were committed by her in the presence of her husband, he was conclusively presumed to have coerced her, and was solely liable for consequent damages.

Same—Coverture as a Defense to Actions in Form ex Delicto.

A married woman was by common law incapable of binding herself by contract, and therefore, like an infant, could not be made liable for a wrong in an action of deceit or the like when this would have in substance amounted to making her liable on contract. For

²² Generally, as to liability of husband for torts of wife during coverture, see *Baker v. Young*, 44 Ill. 42-47; *Wright v. Kerr*, Add. (Pa.) 13; *Dalley v. Houston*, 58 Mo. 361; *Carleton v. Haywood*, 49 N. H. 314; *Jackson v. Kirby*, 37 Vt. 448; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205).

²³ *Solomon v. Waas*, 2 Hilt. (N. Y.) 179.

²⁴ *Capel v. Powell*, 17 C. B. (N. S.) 743; *Head v. Briscoe*, 5 Car. & P. 484; *Phillips v. Barnet*, 1 Q. B. Div. 436; *Wright v. Leonard*, 11 C. B. (N. S.) 258-266; *Cassin v. Delany*, 38 N. Y. 178; *Baker v. Braslin*, 16 R. I. 635, 18 Atl. 1039.

²⁵ 2 Cord, Mar. Wom. § 1147. But see *Draper v. Fulkes*, Yelv. 166; *Keyworth v. Hill*, 3 Barn. & Ald. 685; *Heckle v. Lurvey*, 101 Mass. 344; *Kowing v. Manly*, 49 N. Y. 192, 198, 199.

example, an action could not have been maintained against a husband and wife for her false and fraudulent representation that she was a widow at the time she executed a bond and mortgage, in exchange for which another gave up to her promissory notes to a great amount against third persons.²⁶

60. Modern statutory provisions, as they have extended the powers and rights of married women, have increased her duties and liabilities. Their tendency is

- (a) As to torts committed by her, to attach to her liability jointly with her husband, or to the exclusion of her husband's responsibility by virtue of relationship alone, leaving cases where the husband and the wife are joint tort feasons, or principal and agent, to ordinary rules:**
- (b) As to torts committed against her person and property, to entitle her to recover damages in her own right, subject to her husband's right to recover for damages done him through wrongs to her.**
- (c) As between husband and wife, to deny the right to sue in tort.**

General Effect of American Statutes—Torts Committed by Wife.

In the United States, the common-law disabilities of a married woman, and liability of her husband for her torts, remain, except as modified by statute.²⁷ Rights, duties, and liabilities vary as legislation varies. No universal statement, therefore, can be made as to the general law. But in many, and perhaps most, states, the courts have been exceedingly conservative in adopting startling innovations in the common-law doctrine of liability of the husband for the acts of the wife, and require that the intention to make such changes be clearly and unambiguously expressed. The tendency of statutes, as stated in the black-letter text, will be found in differ-

²⁶ *Keen v. Coleman*, 39 Pa. St. 299; *Woodward v. Barnes*, 46 Vt. 332; *Trust Co. v. Sedgwick*, 97 U. S. 304; *Kowling v. Manly*, 49 N. Y. 192.

²⁷ *Dean v. Metropolitan El. Ry. Co.*, 119 N. Y. 540, 23 N. E. 1054.

ent stages of development in the statutes of the various states. The general rule seems to be that, while the wife's separate estate is liable for her torts, her husband's joint responsibility remains.²⁸ On the other hand, the more advanced stage of opinion and legislation is that, as the presumed and actual control of the wife's person and property by her husband has been removed, her responsibility for her torts and her right to recover for torts committed against her should be recognized, and her husband's corresponding liabilities and rights to recover should disappear. Thus, since the wife's brains and tongue are her own property, there is no reason why she should not be solely liable for slander.²⁹

The presumption of coercion may now be rebutted, and each of the two may be deemed the wrongdoer, the same as if unmarried, and the husband is liable alone only when the wife acted solely under his coercion in fact.³⁰ When the act is joint the liability is joint. The husband and wife may be joint tortfeasors in assault.³¹ If a husband advise or direct a wrong, as an entry on another's premises by his wife, he is liable.³²

Since property converted by the wife does not become a part of the husband's estate, but remains her own as though she was a feme sole, there is no reason why she should not be charged for conversion to her own use, if her husband has no connection with the con-

²⁸ *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 515, 859; *Choen v. Porter*, 66 Ind. 194-199; *McElfresh v. Kirkendall*, 36 Iowa, 224-227; *Enders v. Beck*, 18 Iowa, 86, 87; *Baum v. Mullen*, 47 N. Y. 577, 578; *Mangam v. Peck*, 111 N. Y. 401, 18 N. E. 617; *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354.

²⁹ *Martin v. Robson*, 65 Ill. 125; *Norris v. Corkill*, 32 Kan. 409, 4 Pac. 862. And see *Dobbin v. Cordiner*, 41 Minn. 165, 167, 42 N. W. 870; *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. 23; *Vocht v. Kuklence*, 119 Pa. St. 365, 13 Atl. 199; *Fullam v. Rose*, 160 Pa. St. 47, 28 Atl. 497. But see, contra, *McElfresh v. Kirkendall*, 36 Iowa, 224; *Luse v. Oaks*, Id. 562; *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354.

³⁰ See *Bethel v. Otis* (Iowa) 61 N. W. 200; *Byford v. Girton*, 90 Iowa, 661, 57 N. W. 588; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205); *Quick v. Miller*, 103 Pa. St. 67; *Ball v. Bennett*, 21 Ind. 427; *Baker v. Young*, 44 Ill. 42; *Kosminsky v. Goldberg*, 44 Ark. 401; *Miller v. Sweitzer*, 22 Mich. 391; *Cassin v. Delaney*, 38 N. Y. 178; *Marshall v. Oakes*, 51 Me. 308; *Carleton v. Haywood*, 49 N. H. 814; *Simmons v. Brown*, 5 R. I. 299.

³¹ *Hayden v. Woods*, 16 Neb. 306, 20 N. W. 345.

³² *Bauerschmitz v. Bailey*, 29 Ill. App. 295.

duct constituting the conversion.³³ In dealing with her own property she is liable in tort separate from her husband, even if her husband be liable for her personal tort.³⁴

Where the wife does an act not under her husband's coercion, but both of them act on their own accord, they may be sued jointly; as where they voluntarily join in conversion,³⁵ or assault and battery.³⁶ The husband may be liable for the acts of his wife as his agent. Thus, on a sale of business, where the wife represented the daily receipts as greatly in excess of what they really were, her husband, as principal, was held personally liable.³⁷ The wife may be held liable for the acts of her husband as her agent. Thus, she can be held liable for the fraud of her husband dealing as her agent with such property.³⁸

Same—Torts Committed against the Wife.

A wife may now generally recover for her own use damages suffered from a personal tort committed against her. The right of the wife to sue for tort to her separate or community property is generally recognized. This entire subject will be subsequently considered at some length.

Torts as between Husband and Wife.

The policy of the law does not incline to admit that a husband and wife can commit torts against each other.³⁹

³³ Hagebush v. Ragland, 78 Ill. 40; Carreau v. Chapotel, 45 La. Ann. 850, 13 South. 250.

³⁴ Vanneman v. Powers, 56 N. Y. 39-42; Quilty v. Pattie, 135 N. Y. 201, 82 N. E. 47. Compare *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907.

³⁵ Estill v. Fort, 2 Dana (Ky.) 237; Peak v. Lemon, 1 Lans. 295. And see *Blake v. Blackley*, 109 N. C. 257, 13 S. E. 786; *Wirt v. Dinan*, 44 Mo. App. 583.

³⁶ Roadcap v. Sipe, 6 Grat. 213; *Griffin v. Reynolds*, 17 How. 609.

³⁷ Taylor v. Green, 8 Car. & P. 316.

³⁸ Ferguson v. Brooks, 67 Me. 251; *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533.

³⁹ Post, p. 274.

SAME—LANDLORD AND TENANT.

61. Prima facie, the occupant, and not the owner or landlord, is liable to third persons for injuries caused by the failure to keep the premises in repair. The liability may, however, be extended to the landlord or owner

- (a) When he contracts to repair.**
- (b) Where he knowingly demises the premises in a ruinous condition, or in a state of nuisance.**
- (c) Where he authorizes a wrong.⁴⁰**

The general rule as to the liability, as between landlord and tenant, for injuries caused by the defective condition of the premises, is "that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition."⁴¹

Contract to Repair.

If, however, the landlord lets the premises with a covenant to repair, even if the tenant is to pay for them, the landlord is liable. Under such circumstances, workmen negligently left the entrance

⁴⁰ *Adams v. Fletcher*, 17 R. I. 137, 20 Atl. 263; *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644; *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87; *Franke v. City of St. Louis*, 110 Mo. 516, 19 S. W. 938; cases collected in *Pell v. Reinhart*, 12 Lawy. Rep. Ann. 843 (127 N. Y. 381, 27 N. E. 1077); *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421.

⁴¹ Underh. Torts, *p. 129, rule 22. Thus, in *Cheetham v. Hampson*, 4 Term R. 318, it was held that an action on the case, for not repairing fences, to the injury of plaintiff, can only be maintained against occupier, and not against the owner of the fee, who is not in possession. *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193 (collecting authorities); *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987. Lessor of railroad is not liable for torts of lessee. *Miller v. Railroad Co.*, 125 N. Y. 118, 26 N. E. 35. Landlord not liable for damage caused by want of ordinary repairs to privy vaults. *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010. See, generally, *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87. Cf. *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841; cases collected in *Pell v. Reinhart*, 12 Lawy. Rep. Ann. 843 (127 N. Y. 381, 27 N. E. 1077); *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209; *Fisher v. Thirkell*, 21 Mich. 1.

to the cellar in the public hall uncovered during the night, and the plaintiff fell into it and was injured. The landlord was held liable.⁴² On the other hand, if tenant covenants to keep the premises in repair, the landlord cannot be said to authorize the continuance of a nuisance; and not he, but the tenant, will be liable.⁴³

Letting Premises in Ruinous Condition or State of Nuisance—Authorizing Wrongs.

Moreover, if the landlord knowingly let the property in a condition of nuisance, he (and the tenant also) may be liable to third persons.⁴⁴ He is said to have authorized the continuance of the wrong only if he had notice of ruinous condition,⁴⁵ and not then if the tenant is bound to repair.⁴⁶ But where property is demised and at the time of the demise is not a nuisance, but becomes so only by the act of the tenant while in his possession, and the injury happens during such possession, the owner is not liable.⁴⁷ But where the owner leases premises which are in a condition of nuisance, or must

⁴² *Leslie v. Pounds*, 4 Taunt. 649; *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311. Cf. *Pretty v. Bickmore*, L. R. 8 C. P. 401, with *Gwinnell v. Eamer*, L. R. 10 C. P. 658. But reservation of right to enter premises to repair the same does not attach liability to landlord. *Clifford v. Atlantic Mills*, 146 Mass. 47, 15 N. E. 84. See *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, distinguishing *Sterger v. Van Siclen*, 55 Hun, 605, 7 N. Y. Supp. 805; *Id.*, 132 N. Y. 499, 30 N. E. 987.

⁴³ *Post*, note 46. If the landlord undertakes to transmit power to adjacent buildings, he is liable for injury to an employé of one of the tenants by negligence in not keeping pulleys and shafts in safe condition, though the lease required tenant to keep shaft in repair. *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046; *Pretty v. Bickmore*, L. R. 8 C. P. 401.

⁴⁴ *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620. Both may be liable for negligence,—the landlord for negligence in construction; the tenant, for negligence in use of such premises. *Eakin v. Brown*, 1 E. D. Smith, 36; *McDonough v. Gilman*, 3 Allen (Mass.) 264; *Todd v. Flight*, 9 C. B. (N. S.) 377; *Gandy v. Jubber*, 5 Best & S. 485, 9 Best & S. 15; *Rich v. Basterfield*, 4 C. B. 783; *Russell v. Shenton*, 3 Q. B. 449; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628.

⁴⁵ *Welfare v. London & B. Ry. Co.*, L. R. 4 Q. B. 693; *Southcote v. Stanley*, 1 Hurl. & N. 247; *Slight v. Gutzlaff*, 35 Wis. 675. But such knowledge may be constructive. *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786; *Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575.

⁴⁶ *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnell v. Eamer*, L. R. 10 C. P. 658. But see *Ingwersen v. Rankin*, 47 N. J. Law. 18.

⁴⁷ *Owings v. Jones*, 9 Md. 108; *Rich v. Basterfield*, 4 C. B. 783.

in the nature of things become so by their user, and receives rent, he is liable for the injury resulting from such nuisance.⁴⁸ Thus, if landlord let premises with a stack of chimneys in a ruinous and fallen state, he is liable for damages;⁴⁹ but if he builds a chimney which by the act of the tenant becomes a nuisance, the tenant is liable, and not the landlord.⁵⁰ But where the demise was of a lime kiln and quarry, the landlord was held liable for the nuisance resulting from smoke from the kiln, as being the necessary consequence of an act he authorized.⁵¹ A fortiori, if the lessor of premises licenses the lessee to perform acts which amount to a nuisance, the lessor is liable.⁵²

Liability of Landlord to Tenant.

An implied grant of whatever is necessary or beneficial to the thing granted has been recognized. Therefore a tenant may sue his landlord for granting to a third person permission to construct a chimney obstructing such tenant's window.⁵³ The law does not, however, imply a warranty on the part of the landlord that the premises are fit for occupation or for the tenant's purposes.⁵⁴ Therefore, in the absence of fraud or misrepresentation, a landlord is not responsible for injuries happening to his tenant by reason of a snow-slide or avalanche.⁵⁵

⁴⁸ Roswell v. Prior, 12 Mod. 635; Godley v. Hagerty, 20 Pa. St. 387; Congreve v. Smith, 18 N. Y. 79; Clifford v. Dam, 81 N. Y. 52. Cf. Fisher v. Thirkell, 21 Mich. 1-20; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620.

⁴⁹ Todd v. Flight, 9 C. B. (N. S.) 377.

⁵⁰ Rich v. Basterfield, 4 C. B. 783.

⁵¹ Harris v. James, 45 Law J. Q. B. 545.

⁵² White v. Jameson, L. R. 18 Eq. 303. And see Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757.

⁵³ Case v. Minot, 158 Mass. 577, 33 N. E. 700.

⁵⁴ Buckley v. Cunningham, 103 Ala. 449, 15 South. 826; Baker v. Holtpaafell, 4 Taunt. 45; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Bowe v. Hunking, 135 Mass. 380; Naumberg v. Young, 44 N. J. Law, 341-345.

⁵⁵ Doyle v. Railway Co., 147 U. S. 413, 13 Sup. Ct. 333; Booth v. Merriam, 155 Mass. 521, 30 N. E. 85. A landlord is not liable for a failure to disclose the existence of a defective drain, discovered by him during a tenancy at will, during which the tenant contracted typhoid fever and died. Bertie v. Flagg, 161 Mass. 504, 37 N. E. 572.

SAME—INDEPENDENT CONTRACTOR.

62. An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. He is distinguished from a servant, who, on the other hand, is under the orders and control of his master in respect to the means and methods used to attain the end for which he is employed.

It is of great importance to determine whether in a particular case there exists the relationship of master and servant (in its broadest sense), or of employer and independent contractor. And so far as the defendant is concerned, the question may involve his entire responsibility for damages. If he can show that the harm was done by an independent contractor, in many, perhaps in most, cases he can escape liability.⁵⁶

Ordinarily it is regarded that the test of the relationship is "whether the defendant retained the power of controlling the work."⁵⁸ For example, a person buys standing timber, and a third person contracts to cut it into lumber at an agreed price per thousand feet, assuming

⁵⁶ *Singer Manuf'g Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175; *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52; *Sproul v. Hemmingway*, 14 Pick. 1; *Lawrence v. Shipman*, 39 Conn. 586; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Cuff v. Railroad Co.*, 35 N. J. Law, 17; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049; *Charlebois v. Gogebic & M. R. Co.*, 91 Mich. 59, 51 N. W. 812; *Welsh v. Parrish*, 148 Pa. St. 599, 24 Atl. 86; *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. 321, 956; *Plette v. Bavarian Brewing Co.*, 91 Mich. 605, 52 N. W. 152. See dissenting opinion (Dwight, C.) in *McCafferty v. Railway Co.*, 61 N. Y. 178. As to relation of a tenant, as an independent contractor, to his landlord, vide *Roswell v. Prior*, 12 Mod. 635; *Cheetham v. Hampson*, 4 Term R. 318; *Mahon v. Burns*, 9 Misc. Rep. 223, 29 N. Y. Supp. 682; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421.

⁵⁸ *Fulton Co. St. R. Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828; *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. 649-657; *Painter v. Mayor, etc.*, 46 Pa. St. 213; *Singer Manuf'g Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175.

entire control of the work and hiring and paying his men. Under such circumstances, the purchaser of the timber is not liable for injuries to adjoining land resulting from the negligence of such third person or his employes in the performance of the contract.⁵⁹

But this standard of control is not absolute or inflexible. Certain control on the part of the employer may be retained, and the contractor be an independent contractor and not a servant. The mere fact that the architect of the owner directs certain things to be done by the contractor where he does not exercise control over him in his manner of doing the work or his choice of workmen, does not make the contractor a servant of the owner.⁶⁰ Again, the right of a railway company to inspect, and in a considerable measure to regulate, by its engineer or other proper officer, the construction of way, by a contractor, who nevertheless is independent, is generally recognized.⁶¹ The cases are, however, by no means agreed as to what reservation of control in the contract is consistent with the relationship of employer and independent contractor. The payment of wages, the power to dismiss, select, or compel obedience of the servant, to terminate, control, or to give directions as to the result of the work, afford a test (but not a conclusive or unfailing test) of whether the servant is the servant of the employer or the independent contractor.⁶² Payment by the job instead of by the day does not make an employé an independent contractor.⁶³

⁵⁹ *Knowlton v. Hoit* (N. H.) 30 Atl. 346. A tug owner is an independent contractor, as to vessels in tow. *McLoughlin v. New York Lighterage Transp. Co.* (Com. Pl.) 27 N. Y. Supp. 248.

⁶⁰ *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Linnehan v. Rollins*, 137 Mass. 123.

⁶¹ *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672; *Riedel v. Moran, Fitzsimons & Co.*, 103 Mich. 262, 61 N. W. 509.

⁶² *Quarman v. Burnett*, 6 Mees. & W. 499; *Reedie v. London & N. W. Ry. Co.*, 4 Exch. 244; *Larson v. Metropolitan St. Ry. Co.*, 110 Mo. 234, 19 S. W. 416; *Brackett v. Lubke*, 4 Allen (Mass.) 138; *Forsyth v. Hooper*, 11 Allen (Mass.) 419.

⁶³ *Geer v. Darrow*, 61 Conn. 220, 23 Atl. 1087.

63. A person employing an independent contractor is not generally responsible for the latter's wrongful acts, or those of a subcontractor or servant of either, except when

- (a) He is negligent in the selection of the contractor.
- (b) He personally interferes with, or undertakes to do, or has accepted, the contractor's work.
- (c) The thing contracted to be done is tortious. ✓
- (d) There has been a failure to conform to a standard of duty which is required of the employer absolutely.

As a general rule, the contractor, and not the employer of the contractor, is liable for the tort of the contractor and of the contractor's servants.⁶⁴ Thus, the owner of lands who employs a carpenter for a specific price to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a servant in the employ of the carpenter.⁶⁵ This merely pertains to the mode of doing the work.⁶⁶

Negligence in Selection—Interference with, or Acceptance of, Work.

If the employer is negligent in the selection of his independent contractor, or otherwise, this may be actionable fault.⁶⁷ Interference by the employer with the contractor's work attaches liability

⁶⁴ *City & Suburban Ry. Co. v. Moores*, 80 Md. 348, 30 Atl. 643; *Riedel v. Moran, Fitzsimons & Co.*, 103 Mich. 262, 61 N. W. 509. Where contract is compulsory, see *Milligan v. Wedge*, 12 Adol. & E. 737; *Case of The Maria*, 1 W. Rob. Adm. 95.

⁶⁵ *Hillard v. Richardson*, 3 Gray, 349. Cf. *Robbins v. Chicago City*, 4 Wall. 657, with *Water Co. v. Ware*, 16 Wall. 566. And see *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58.

⁶⁶ *Scammon v. City of Chicago*, 25 Ill. 424; *Wabash, St. L. & P. Ry. Co. v. Farver*, 111 Ind. 195, 12 N. E. 296. Cf. *Skelton v. Fenton Electric Light & Power Co.*, 100 Mich. 87, 58 N. W. 609.

⁶⁷ *Berg v. Parsons*, 84 Hun, 60, 31 N. Y. Supp. 1091; *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32. And see *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Sturges v. Society*, 130 Mass. 414. Cf. *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052.

to him. Thus, where a contractor employed to make a drain left a heap of gravel by the roadside, the employer paid a navvy to cart it away. This was not properly done, and a third person was consequently upset as he was driving home. The employer was held liable.⁶⁸ The effect is the same if the tort arises after an independent contractor has finished his work and his employer has accepted it. Thus, where an independent contractor had dug holes and they had been accepted, the employer was liable for injuries consequent on their being left unguarded.⁶⁹

Liability where Thing Contracted to be Done is Tortious.

When the thing contracted to be done is necessarily tortious or unlawful, merely doing it by another person under any form of contract will not exonerate the employer.⁷⁰ The doctrine of respondeat superior applies.⁷¹

Liability for Breach of Absolute Duty.

Where a person is bound to perform an act as a duty, or is held to a certain standard of conduct, he intrusts the performance of that act to another at his peril. The law recognizes that one who has a duty to perform cannot shift the duty on the shoulders of another, and is liable for its nonperformance although the fault be directly attributable to an independent contractor. Blasting with dynamite, for example, would seem to be so intrinsically dangerous that in many cases the employer cannot excuse himself by showing a contract with another to do the work.⁷²

And, generally, the performance of no duty owed to the public or to private individuals can be delegated so as to escape liability.⁷³ Statutory obligations cannot be escaped by delegation of duties to a

⁶⁸ *Burgess v. Gray*, 1 Man., G. & S. 578.

⁶⁹ *Donovan v. Oakland & B. Rapid Transit Co.*, 102 Cal. 245, 36 Pac. 516.

⁷⁰ *Ellis v. Sheffield Gas Consumers' Co.*, 23 Law J. Q. B. 42; *Creed v. Hartmann*, 29 N. Y. 591. And, generally, see *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132. Cf. *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385; *McCarthy v. City of Syracuse*, 46 N. Y. 194-199.

⁷¹ *Williams v. Fresno Canal & Irr. Co.*, 96 Cal. 14, 30 Pac. 961; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077.

⁷² *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32.

⁷³ *Carrico v. West Virginia R. Co.*, 39 W. Va. 86, 19 S. E. 571; *Spence v.*

contractor.⁷⁴ "Where certain powers and privileges have been specifically conferred by the public upon an individual or corporation, for private emolument, in consideration of which certain duties affecting public health or safety of public travel have been expressly assumed, the individual in receipt of the emoluments cannot be relieved of responsibility by committing the performance of those acts to another. In such cases liability cannot be evaded by showing that the injury resulted from the fault or negligence of a third person employed to perform those duties."⁷⁵ Where a building is being constructed on a city lot, and the excavation in the sidewalk is not protected as required by ordinance, the owner of the lot is liable to persons injured by falling therein, though the work is being done by an independent contractor.⁷⁶

Liability for Acts of Subcontractors.

The rule as to contractors is extended to subcontractors.⁷⁷ The inquiry in both cases is whether the relationship of master and servant exists between the original contractors and the subcontractors.

Schultz, 103 Cal. 208, 37 Pac. 220; Hawver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049; Lebanon Light, Heat & Power Co. v. Leap, 139 Ind. 443, 39 N. E. 57.

⁷⁴ Hole v. Sittingbourne & S. R. Co., 6 Hurl. & N. 488; Ketcham v. Newman, 141 N. Y. 205, 36 N. E. 197.

⁷⁵ Mr. Justice Clark, in Lancaster Ave. Imp. Co. v. Rhoads, 116 Pa. St. 377, 9 Atl. 852. In return for powers and franchise granted, a corporation is under obligation to perform certain duties to the public. A railroad lessor is therefore liable for its lessee's negligence. Abbott v. Railroad Co., 80 N. Y. 27; Langley v. Railroad Co., 10 Gray, 103; New York, etc., Ry. Co. v. Winans, 17 How. 30; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 23, 9 Sup. Ct. 409; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 62, 11 Sup. Ct. 478; Quested v. Newburyport & A. H. R. Co., 127 Mass. 204. The duty of a city to keep its streets in reasonably safe condition cannot be delegated. Wilson v. City of Troy, 135 N. Y. 96, 32 N. E. 44; City of Sterling v. Schiffmacher, 47 Ill. App. 141; City of Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770; Kollock v. City of Madison, 84 Wis. 458, 54 N. W. 725; Contra, Hepburn v. City of Philadelphia, 149 Pa. St. 335, 24 Atl. 279; Painter v. Pittsburg, 46 Pa. St. 213.

⁷⁶ Spence v. Schultz, 103 Cal. 208, 37 Pac. 220; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077; Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82.

⁷⁷ Cuff v. Railroad Co., 35 N. J. Law, 17; New Orleans & N. W. R. Co. v. Reese, 61 Miss. 581; The Harold, 21 Fed. 428; Rapson v. Cubitt, 9 Mees. & W. 710; Scarborough v. Railway Co., 94 Ala. 497, 10 South. 316.

If it does not, then not the contractors, but the subcontractors, are liable for their own and for their servants' wrongs.⁷⁸

SAME—MASTER AND SERVANT.

64. Liability for torts, as affected by the relation of master and servant, may for convenience be treated under the following heads:

- (a) Master's liability to third persons for torts of servant.
- (b) Master's liability to servant.
- (c) Servant's liability to servant.
- (d) Servant's liability to master.
- (e) Servant's liability to third persons.

SAME—MASTER'S LIABILITY TO THIRD PERSONS.

65. Liability to third persons for torts of his servant attaches to the master in any one or more of the five ways in which liability may attach to a defendant.⁷⁹

As has been seen, liability for tort may in general arise in one or more of five ways,—from personal commission, consent, relationship, instrumentality, and estoppel. It may assist in understanding a confused subject to apply this idea to cases of master and servant. In the first place, the master may assist the servant in performing a tortious act, and thus become, by personal participation, a joint tortfeasor with him. Little trouble arises from so simple a case. Accurately speaking, here the master is not liable for his servant's tort; all the wrong is his own. In the second place, when a master authorizes his servant (or even an independent contractor)⁸⁰ to undertake a contract to do a tortious thing, the master is liable. The liability which arises from ratification of an unauthorized wrong of a servant rests on similar principles.⁸¹ In the third place, liability

⁷⁸ *Pack v. Mayor, etc.*, 8 N. Y. 222. And see *Johnston v. Ott*, 155 Pa. St. 17, 25 Atl. 751; *Dalyell v. Tyrer*, 28 Law J. Q. B. 52.

⁷⁹ Ante, p. 35.

⁸⁰ Ante, p. 135.

⁸¹ Ante, p. 40, "Ratification or Adoption."

may arise from relationship of master and servant and of master to plaintiff (a third person) in an action against the master for the servant's tort.⁵² In the fourth place, the instrumentality of the master may impose a duty on him, for the violation of which by his servant in connection with such instrumentality the master may be held liable.⁵³ And, in the fifth place, a master may so conduct his business and so profit by his servant's fraud that the law will not allow him to deny responsibility for the employé's wrong.

As a matter of fact, the four elements—consent, relationship, instrumentality, and estoppel—are, as cases arise in actual practice, very much confused, as sources of liability, both in fact and in the theory of law. Therefore, after consent proper has been considered, liability because of relationship (incidentally involving instrumentality) will naturally come up for attention. Liability because of instrumentality proper is determined by principles of negligence and of the duty to insure safety. Its consideration will therefore be postponed until those subjects come up in logical order as specific wrongs.

66. EXISTENCE OF RELATION—The doctrine of respondeat superior applies only where the peculiar relationship here to be described as that of master and servant is shown to exist.⁵⁴ It may be created expressly by agreement of parties or inferred from all the circumstances of a given case.

The relationship must be established before the doctrine of respondeat superior will be applied. The relationship is based on the peculiar contract of the master and servant. Mere contract of bailment does not create it.⁵⁵ The contract is usually express; but

⁵² Post, p. 147.

⁵³ Post, pp. 149, 151.

⁵⁴ The early law knew only "servants." "Agent" is a later branching off of the same class. Whatever distinction there may be between these terms, the relationship of master and servant, principal and agent, employer and employé, and the like, may be safely treated here as identical.

⁵⁵ But see *Linnehan v. Rollins*, 137 Mass. 123; *Sproul v. Hemmingway*, 14 Pick. 1; *Stevens v. Armstrong*, 6 N. Y. 435; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Carter v. Berlin Mills Co.*, 58 N. H. 52; *Powles v. Hider*, 6 El. & Bl. 207; *Venables v. Smith*, 2 Q. B. Div. 279; *King v. Spurr*, 8 Q. B. Div. 104; *Schular v. Hudson River R. Co.*, 38 Barb. 653.

the consent involved may be also implied. The privity does not exist where the relationship has been terminated by either party. Therefore, if a discharged employé maliciously misplaces a switch and wrecks a train, the company may not be liable.⁸⁷

While in many cases there may be no doubt that the relationship of master and servant exists, it is often no easy matter to determine who is the proper person to be charged with liability as master. In many cases of this kind the master is to be determined by inspection of the contract. Thus, where one sold and delivered fireworks, and sent a man to assist in their exhibition, the purchaser was held, under construction of the contract, not to have been the master of such person, and therefore not liable for the explosion resulting from such person's negligence. "The master is the person in whose business he is engaged at the time and who has the right to direct and control his conduct."⁸⁸

A similar question arises as between a railroad company and a sleeping-car company. It seems that the porter is the servant of the railroad company sufficiently to attach liability to it for his torts.⁸⁹

A messenger sent by a district telegraph company in response to a call from one of its boxes is the agent of the company, and the company is liable where the messenger carelessly loses a package which he was called to carry.⁹⁰

A servant may remain the general servant of his original master and still be the servant of the person to whom he may be lent for particular employment.⁹¹

⁸⁷ *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 18 S. E. 18.

⁸⁸ *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381. Compare *Colvin v. Peabody*, 155 Mass. 104, 29 N. E. 59. Compare *Knight v. Fox*, 5 Exch. 721, with *Blake v. Thirst*, 2 Hurl. & C. 20.

⁸⁹ *Dwinelle v. New York Cent. & H. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654, 12 S. W. 744; *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 23 S. W. 70. But see *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609; *Lemon v. Pullman Palace Car Co.*, 52 Fed. 282.

⁹⁰ *Sanford v. American Dist. Tel. Co.* (City Ct. N. Y.) 27 N. Y. Supp. 142.

⁹¹ *Donovan v. Laing* [1893] 1 Q. B. 629; *Byrne v. Kansas City, Ft. S. & M. R. Co.*, 9 C. C. A. 666, 61 Fed. 605.

67. LIABILITY BY CONSENT—The master is liable for the tort of his servant because of actual consent

- (a) When he has authorized its commission in the first instance or made it his own by adoption.
- (b) When he has commanded the doing of a thing which necessarily or almost unavoidably results in damage to third persons.

Torts Authorized or Adopted.

The master is clearly liable for all torts which he commanded in the first instance, or which, having been done for his benefit, he has subsequently assented to. Thus, if a master directs his servant to commit a trespass, maintain a nuisance, perpetrate a fraud, or convert property of another to his own use, the master is certainly liable.⁹² As to cases of this kind the maxim of "qui facit per alium facit per se,"—that is, the doctrine of identification of master and servant,—furnishes a sufficient reason. The same reasoning applies to the ratification by the master even of a servant's malicious conduct.⁹³

The master alone may be liable, or he and his servant may be joint tortfeasors. If a man, knowing his sheep to have rot, sends his son to market to sell them, fraudulently withholding from him the fact that they are diseased, and the son sells them on the representation that they are sound, the father is liable for his own fraud,⁹⁴ but the servant may also be liable.⁹⁵ The master who commands a trespass and the servant who commits it; the master who authorizes a false representation and the servant who makes it; and, gen-

⁹² *Southerne v. Howe*, 2 Rolle, 5, 26. And see *State v. Smith*, 78 Me. 260, 4 Atl. 412; *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. 197; *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399. See ante, p. 35.

⁹³ *International & G. N. Ry. Co. v. Miller* (Tex. Civ. App.) 28 S. W. 233. See ante, p. 40.

⁹⁴ *Ludgater v. Love*, 44 Law T. (N. S.) 694; *Griffing v. Diller*, 66 Hun. 633, 21 N. Y. Supp. 407; *National Exch. Co. v. Drew*, 2 Macq. 103-145, per Lord St. Leonards.

⁹⁵ *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 240; *Duvall v. Peach*, 1 Gill, 172; *Lamborn v. Watson*, 6 Har. & J. 252.

erally, the master who authorizes a wrong and the servant who does the wrong,—are responsible as joint tort feasons.⁹⁶

No amount of care will exonerate parties who authorize a wrongful act, if it result in damage.⁹⁷ As has been previously shown, one who orders the doing of an unlawful act which produces injury, is liable, whether it has been done by his own servant or by a contractor or by a contractor's servant.⁹⁸ In such cases, it is apparent that the very command or request establishes the relationship of master and servant.

Injurious Conduct Commanded.

Where the master has directed the servant to do something which may not be in itself a cause of injury, but which by its very nature cannot be done without necessarily or almost necessarily causing damage to others, the master is liable. Thus, in a celebrated case, the right of way was disputed between adjacent occupiers, and the one who resisted the claim ordered a laborer to lay down rubbish to obstruct the way, but not so as to touch the other's wall. The laborer executed the order as nearly as he could, and laid the rubbish some distance from the wall, but it soon "shingled down," and ran against the wall. For this the employer was held to answer in trespass, not in case. The master in such case could no more disclaim responsibility for the act of his servant than if he had done the thing himself. In cases of this kind, it is often difficult to determine whether the master should be held responsible because of the command, or because the act was committed in course of the employment; but it would seem that trespass lies as for the master's direct, not case for his indirect, act.⁹⁹

⁹⁶ Bates v. Pilling, 6 Barn. & C. 38; Peck v. Cooper, 112 Ill. 192; Lamm v. Port Deposit Homestead Ass'n, 49 Md. 233; Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; Moore v. Appleton, 26 Ala. 633; Miller v. Staples, 3 Colo. App. 93, 32 Pac. 81. See ante, p. 120.

⁹⁷ Congreve v. Smith, 18 N. Y. 79.

⁹⁸ Houston & G. N. R. Co. v. Meador, 50 Tex. 77; Sutherland v. Ingalls, 63 Mich. 620, 30 N. W. 342; ante, p. 135.

⁹⁹ Gregory v. Piper, 9 Barn. & C. 591.

68. LIABILITY INDEPENDENT OF CONSENT — The master is liable for the conduct of his servant, not only when liability would attach by reason of consent, but whenever a duty rests on the master to avoid doing harm to third persons, and the servant violates that duty by acting in the course of his employment.

69. Liability independent of consent will be considered under two heads:

- (a) The servant's conduct.
- (b) The master's duty.

(a) THE SERVANT'S CONDUCT.

According to the early Germanic theory, a master is absolutely liable for the crimes and torts of his servants.

Particular Command as a Test of Liability.

But in England, even from a very early date, it was recognized that command (i. e. before the deed) or consent (i. e. before or after the deed) was in some vague way the condition of the master's criminal liability for the acts of his servant. This principle was extended to the civil liability, and confined the master's liability to cases where the command or consent was particular. Thus, according to Bacon (early in the seventeenth century), "in committing of lawful authority to another a party may limit it as strictly as it pleaseth him; and if the party authorized do transgress his authority, though it be but in circumstance expressed, yet it shall be void in the whole act."¹⁰⁰ This period is treated as beginning with "Edward I., time 1300, circa." This carried the courts from the one extreme of universal responsibility for the conduct of servants to the other, of responsibility only when the conduct of the servant had been explicitly commanded by the master. Logically, the reason assigned for this test of the liability of the master was identification. The master was liable because the act of the servant was clearly his act. "Qui facit per alium facit per se." The doctrine, however, has not entirely disappeared. A specific command has in modern times been

¹⁰⁰ Bac. Max. 16; Kingston v. Booth, Skin. 228.

held to exclude liability for acts done in pursuance of it, but not included within it. Thus, where a servant was directed to drive cattle out of a certain field, and he drove them elsewhere than out of that field, and one of them died, the master was held not liable (1862).¹⁰¹

General or Implied Command as a Test.

The next test proposed was command, not only where the conduct of the servant was particularly or specifically authorized, but also when the command was implied from general authority. The period during which this reaction from the severe limitation of the particular command test arose, and liability for implied command came to be added, may be said to have commenced during Lord Holt's time, about 1700. Thus, in *Armory v. Delamirie*,¹⁰² a chimney sweeper's boy handed to an apprentice, to be weighed, a jewel which he had found. The apprentice kept the stone. And Pratt, C. J., held that the action well lay against the master, who gave credit to his apprentice, and is answerable for his neglect. Blackstone recognizes command as a test. "As for those things which the servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the acts of his servant if done by his command, either expressly given or implied,—'nam qui facit per alium facit per se.' Therefore, if a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it. * * * In the same manner, however, what a servant is permitted to do in the usual course of his business is equivalent to a general command."¹⁰³

Scope of Authority as a Test.

Liability under the test of particular or general command rests on consent. More extended liability is now recognized, but the courts are not in harmony as to whether the limit of his responsibility is determined by the scope of the servant's authority, or the course of his employment. Early in the nineteenth century, scope of authority was adopted as a test to cover cases of liability recognized by courts

¹⁰¹ *Oxford v. Peter* (1862) 28 Ill. 434. And see *Sagers v. Nuckolls*, 3 Colo. App. 95, 32 Pac. 187; *Pickens v. Diecker*, 21 Ohio St. 212; *Lyons v. Martin*, 8 Adol. & E. 512; *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575.

¹⁰² 1 Strange, 505.

¹⁰³ 1 Bl. Comm. 429; *Hern v. Nichols*, 1 Salk. 289; *Jones v. Hart*, 2 Salk. 441.

but not logically accounted for by the doctrine of command. The master still remained liable in all cases in which he would have been held liable under the command tests.¹⁰⁴ Thus, one who undertakes the collection of a claim is liable for the negligence of the attorney employed by him, through whose fault the claim is lost.¹⁰⁵

Same—Includes Excessive or Mistaken Execution of Authority.

But, in addition, the master also became responsible for injuries inflicted by his servants in cases not thus attributable to him, but still within the scope of his servant's authority. The master became liable for excessive or mistaken execution of authority.¹⁰⁶ Thus, if the master authorized his servant to use force, he was held liable for the violence or misjudgment of his servant in the exercise of force, because he authorized its employment in the first instance.¹⁰⁷

Same—Includes Liability for Forbidden Conduct.

In the same way, implied authority may be strained to justify the use of all means necessary and designed to accomplish the master's purpose, however improper, and even unlawful. Thus a driver may convert hay to supply his master's horses so as to enable him to complete his journey, where none was provided.¹⁰⁸ Where, how-

¹⁰⁴ Sharrod v. London & N. W. R. Co., 4 Exch. 580; Goodman v. Kennell, 1 Moore & P. 241; Wright v. Wilcox, 19 Wend. 343; Patten v. Rea, 2 C. B. (N. S.) 606.

¹⁰⁵ Siner v. Stearne, 155 Pa. St. 62, 25 Atl. 826; Bradstreet v. Everson, 72 Pa. St. 124; Morgan v. Tener, 83 Pa. St. 305.

¹⁰⁶ Paley, Prin. & Ag. 1811; Nicholson v. Mounsey, 15 East, 384; Sleath v. Wilson (1839) 9 Car. & P. 607; Story, Ag. 1839; Smith, Mast. & Serv. 1852; Cornfoot v. Fowke (1840) 6 Mees. & W. 358; Coleman v. Riches, 16 C. B. 104; Bolingbroke v. Board (1874) L. R. 9 C. P. 575; Maier v. Randolph, 33 Kan. 340, 6 Pac. 625.

¹⁰⁷ Rounds v. Railway Co., 64 N. Y. 129; Cohen v. Railway Co., 69 N. Y. 170; Peck v. Railway Co., 70 N. Y. 587; Hewett v. Swift, 3 Allen, 420; Moore v. Railway Co., 4 Gray, 465; Levi v. Brooks, 121 Mass. 501; Flick v. Railway Co., 68 Wis. 469, 32 N. W. 527; Baxter v. Railway Co., 87 Iowa, 488, 54 N. W. 350; Rogahn v. Foundry Co., 79 Wis. 573, 48 N. W. 669; Cosgrove v. Ogden, 49 N. Y. 255; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Chicago City Ry. Co. v. McMahon, 103 Ill. 485.

¹⁰⁸ Potulni v. Saunders, 37 Minn. 517, 35 N. W. 379; Walker v. Johnson, 28 Minn. 147, 9 N. W. 632; Levi v. Brooks, 121 Mass. 501; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125-133; People v. Roby, 52 Mich. 577, 18 N. W. 365; Quinn v. Power, 87 N. Y. 535. The master

ever, the act of the servant is willful, and forbidden by the master, it can hardly be said that the command test is sufficient to account for the master's liability. Under the command-test theory the master was not held responsible for such acts. Thus, in *McManus v. Crickett*¹⁰⁹ it was held that the master was not liable in trespass for the willful act of his servant, as by driving his carriage against another without the direction or assent of the master.

In 1862, however, it was held in *Limpus v. London General Omnibus Co.*¹¹⁰ that where the driver of an omnibus drove across the road in front of a rival omnibus, which was thereby overturned, his employer was liable, although he had expressly forbidden the driver to obstruct any omnibus. "The question was, did the servant do it to serve his master's interests, or did he act merely from private spite and with the intention of injuring his enemy?" The master was held liable in the former, but not in the latter, case. Where the conduct was for the master's purpose or benefit, and not for the servant's private motives, whether it was an excessive or mistaken execution of authority or a direct violation of the master's command, the master is liable. Scope of authority, as a test, therefore, is merely an enlargement of the command tests, by the addition of the master's benefit as the test of liability. Under this doctrine, it has been held that a cashier can rob a bank of a special deposit without rendering the bank liable for his theft.*

Course of Employment as a Test.

Under the theories of command and scope of employment, liability is based on consent, express or implied. They depend for justification upon reasoning as to the authority of the servant, and not as to the duty of the master. They are a limit assigned rather by public policy than consistent logic. Another conception of the master's

is civilly liable if his bartender, in violation of instructions and law, sell liquors to excessive drunkards. *George v. Gobey*, 128 Mass. 289; *Worley v. Spurgeon*, 38 Iowa, 465; *Peterson v. Knoble*, 35 Wis. 80; *Smith v. Reynolds*, 8 Hun (N. Y.) 128; *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 475, 2 N. W. 801. Liability of master for exaction of usury: *Payne v. Newcomb*, 100 Ill. 611.

¹⁰⁹ 1 East, 107 (1800). And see *Croft v. Alison*, 4 Barn. & Ald. 590; *Middleton v. Fowler*, 1 Salk. 282.

¹¹⁰ 32 Law J. Exch. 34, 1 Hurl. & C. 526.

* *Foster v. Essex Bank*, 17 Mass. 479.

liability rests on the proposition that in certain cases the liability arises not exclusively from the relationship of master and servant, but also from the duty owed by the master to third persons, under the circumstances of the particular case.

It would seem that the scope of authority test considers too exclusively the former relationship, and overlooks the latter. In fact, one's right infringed by the wrong of another may be in personam or in the nature of a right in personam; as where a passenger complains of the torts of a carrier's servant, or a customer of the torts of a proprietor's servant. Again, the duty violated may (with some latitude in expression) be said to be in rem; as where harm to a stranger is caused by another person's dangerous instrumentalities, as by explosion of an engine. Accordingly, in the former class of cases part of the defendant's duty is derived from the contract or relationship existing between him and the person injured. In the latter class of cases, part of the defendant's duty is derived from the use or custody of the things likely to do harm. But in actual occurrence, in ordinary practice, both sources and other sources contribute to produce the duty, and the cause of action.

Same—General Meaning of "Course of Employment."

The latest stage of development seems to be to hold the master liable for all torts of his servants committed while in the course of employment. The test is not very definitely used. While the doctrine and terminology is frequently accepted, it is constantly confused, both as to language and thought, with the scope of authority and the test of command.¹¹¹ The term is not a new one, and has not always been, nor is it now always, used in this sense.¹¹²

Mr. Abbott, in his note to *Mallach v. Ridley*,¹¹³ collects a large number of cases, and very clearly states this phase of the law, as

¹¹¹ General scope: *Young v. South Boston Ice Co.*, 150 Mass. 527, 23 N. E. 326; *North Chicago City Ry. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 522; *Chicago, M. & St. P. Ry. Co. v. West*, 125 Ill. 320, 17 N. E. 788; *Whatman v. Pearson*, L. R. 3 C. P. 422. In respect to the very transaction: *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381. Prosecution of business intrusted to him: *Palmer v. Railway Co.*, 133 N. Y. 265, 30 N. E. 1001. The phrases "scope" and "course of employment" are used interchangeably. *Aycrigg's Ex'rs v. Railway Co.*, 30 N. J. Law, 460.

¹¹² *Foster v. Bank* (1821) 17 Mass. 479-510; *Oxford v. Peter*, 28 Ill. 434.

¹¹³ 24 Abb. N. C. 172.

follows: "Some say that it is only when the act of the servant is within the scope of employment of the master that the master is liable; others, that it is enough that it was in the course of employment. The principle now recognized is that while the employé is acting in the course of employment the employer is liable, even though the act was without the scope of employment,—that is to say, unauthorized; and a number of the cases go so far as to hold (and, it seems, justly) that if it was done in the apparent course of his employment, and with the implements and facilities of the employer's place and premises, the employer is liable, notwithstanding the act may have been in a service not stipulated for by the contract of employment, or during hours when the contract of employment did not require any service."

Same—Authority of Master not the Test of Liability.

The liability of the master for the conduct of his servant in the line of the latter's duty is unquestioned. The difficulty arises in cases where the act of the servant is not only unauthorized, but forbidden. The divorce of the law of the liability of the master for the torts of the servant from the test of authority appears in the generally recognized rule that the master cannot discharge his duty, nor limit his liability to third persons, by prescribing rules for the regulation of his servant's conduct, and by the exercise of diligence in securing their enforcement. He can discharge his duty only by actual performance. He is bound not only to make rules, but to see that they are enforced. He is liable for acts which he may have expressly forbidden. He cannot define or affect his liability for non-performance of duty to third persons by limiting the authority of his servant. "To so qualify the maxim 'respondeat superior' would be in a measure to nullify it."¹¹⁴ If the liability of the master for the tort of his servant be regarded from the point of view of the duty of the master, it does not logically or necessarily depend on command or authority. "Authority to the servant to be negligent is not required to make the master liable."¹¹⁵

¹¹⁴ Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468; Singer Manuf'g Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175; Consolidated Ice Mach. Co. v. Kelfer, 134 Ill. 481, 25 N. E. 799.

¹¹⁵ Gilfillan, C. J., in Ellegard v. Ackland, 43 Minn. 352, 45 N. W. 715.

Same—Hours of Employment not an Unfailing or Exclusive Test of Liability.

Hours of employment do not seem to determine the liability of the master absolutely. On the one hand the servant may commit an independent tort during the hours of work,¹¹⁶ and on the other hand he may do something outside of working hours which will make the master liable for his act. Thus, where a tollgate keeper ceases to collect tolls at 9 o'clock at night, but remains in charge as the proprietor's only servant, and a traveler was injured by the keeper's letting down the gate after that hour, it was held that the proprietor was liable for his act.¹¹⁷ But an employer, of course, is not liable for the tort of his servant after the employment is ended.¹¹⁸ The servant may be within the employment of the master while going and coming from work.¹¹⁹ The mere fact that damage occurred during the noon hour will not prevent the master's liability. Thus, where a driver not permitted by his contract with his master to go home for dinner, or to leave his horses and cart, went home to dinner and left his horses unattended, the master was held liable for damages done by the running away of the horses.¹²⁰

(b) THE MASTER'S DUTY.

Contractual or Conventional Duties.

The duty owed by the master to third persons may arise from contractual or conventional relationship of the master to the person seeking to charge him for his servant's wrong, especially where the master's premises, instrumentalities, and facilities of business made the harm possible, or where the master will be held estopped to deny liability.

Where the duty arises out of a contract or some particular rela-

¹¹⁶ Post, p. 158.

¹¹⁷ Noblesville & E. G. R. Co. v. Gause, 76 Ind. 142.

¹¹⁸ Yates v. Squires, 19 Iowa, 26; Baird v. Pettit, 70 Pa. St. 477-483; Baltimore & O. Ry. Co. v. State, 33 Md. 542-554. But see Ewald v. Chicago & N. Ry. Co., 70 Wis. 420, 36 N. W. 12, 591.

¹¹⁹ Vick v. Railway Co., 95 N. Y. 267.

¹²⁰ Whatman v. Pearson, L. R. 3 C. P. 422. See, also, Broderick v. Depot Co., 56 Mich. 261-268, 22 N. W. 802; Morier v. St. Paul, M. & M. Ry. Co., 31 Minn. 351, 17 N. W. 952; Russell v. Railway Co., 17 N. Y. 134.

tionship between the parties, this is quite clear. Thus, a common carrier not only owes a duty to a passenger of at least limited protection against violent insults of a stranger and co-passenger, but he is also bound to see that the passenger does not suffer from the violence and assaults of his own servants. He cannot limit his liability by saying such acts were unauthorized; nor is it material that the conduct of his servant is not only reckless, but malicious and capricious. Therefore a railroad company is liable where its servant kissed ¹²¹ a female passenger or indecently insulted her.¹²² The nature of the duty owed where there is a contract between the parties appears in the difference as to degree of protection to which a trespasser is entitled. Thus it is said that a trespasser in a train cannot recover for the willful conduct of a railway servant, especially while putting the trespasser off the train;¹²³ but a railway company has no right to inflict injury on him wantonly or recklessly.¹²⁴ Similarly, a patron of a theater has a right to be protected while in the theater, and if the ticket agent should call on any one of the number in the theater to "put that nigger out," and some ruffian does so, the proprietor will be liable.¹²⁵ It was said at an early time that cases of this kind were "exceptions founded on public policy."¹²⁶ However, it is not only in cases where there is a contract between the party that the duty to protect against harm by servants exists. Thus, where a merchant invites a customer to enter his premises, he is responsible for the willful and malicious arrests,¹²⁷ or assaults

¹²¹ *Craker v. Railway Co.*, 36 Wis. 657.

¹²² *Campbell v. Pullman Palace Car Co.*, 42 Fed. 484; *Bryant v. Rich*, 106 Mass. 180; *Chicago & E. Ry. v. Flexman*, 103 Ill. 546; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101-111, 13 Sup. Ct. 261; *Hoffman v. New York Cent. & H. R. R. Co.*, 87 N. Y. 25; *Dean v. Depot Co.*, 41 Minn. 360, 43 N. W. 54; *Palmer v. Railway Co.*, 133 N. Y. 261, 30 N. E. 1001.

¹²³ *Alabama G. S. R. Co. v. Harris*, 71 Miss. 74, 14 South. 263; *Illinois Cent. R. Co. v. Latham*, 72 Miss. 32, 16 South. 757.

¹²⁴ *St. Louis, I. M. & S. Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881; *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S. W. 737; *Planz v. Boston & A. R. Co.*, 157 Mass. 377, 32 N. E. 356.

¹²⁵ *Drew v. Peer*, 93 Pa. St. 234.

¹²⁶ *Foster v. Essex Bank*, 17 Mass. 479-510.

¹²⁷ *Geraty v. Stern*, 30 Hun, 426; *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193; *Hershey v. O'Neill*, 36 Fed. 168. But see *Mali v. Lord*, 39 N. Y. 381.

of his servants.¹²⁸ Where an insane servant killed a person who was in the master's office for the transaction of business, the master was held liable.¹²⁹

Duty as to Instrumentalities—Conduct of Servants.

The master's duty to third persons may arise from ownership or custody of dangerous things, and it may extend to the conduct of the servant, though forbidden, and for the servant's private purpose and not for the master's benefit, and to the unauthorized conduct of strangers or mere volunteers.

Whoever owns, uses, or controls property which is in itself dangerous, or is likely to result in damage to others, is held by law to the duty of protecting others from injury therefrom.¹³⁰ Sometimes this duty amounts to insurance, at other times to the exercise of proportionate care. When the master owns, uses, or controls such instrumentalities, he is bound to perform that duty, and he cannot escape it by the exercise of care in the selection of his servants. Therefore the master was held liable for the forbidden act of his employes who frightened horses by blowing steam¹³¹ from an engine of which they had full charge. And for the same reason the owner of property is liable for the act of his servant in setting fire to grass whereby a neighbor is damaged.¹³² The liability of the master is sometimes worked out on the line that he is responsible for negligence in the custody of a dangerous thing, rather than on the line of responsibility because of the act of the servant.¹³³

¹²⁸ *Mallach v. Ridley* (Sup.) 9 N. Y. Supp. 922.

¹²⁹ *Christian v. Columbus & R. Ry. Co.*, 90 Ga. 124, 15 S. E. 701. And see *Sherley v. Billings*, 8 Bush, 147; *Bryant v. Rich*, 106 Mass. 180.

¹³⁰ *Hanson v. Globe Newspaper Co.*, 159 Mass. 301, 34 N. E. 462.

¹³¹ *Texas & P. Ry. Co. v. Scoville*, 10 C. C. A. 479, 62 Fed. 730; *Toledo, W. & W. Ry. Co. v. Harmon*, 47 Ill. 298; *Chicago, B. & Q. Ry. Co. v. Dickson*, 63 Ill. 151; *Cobb v. Columbia & G. Ry. Co.*, 37 S. C. 194, 15 S. E. 878.

¹³² *Johnson v. Barber*, 10 Ill. 425.

¹³³ *Smith v. New York Cent. & H. R. R. Co.*, 78 Hun, 524, 29 N. Y. Supp. 540. And see *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451. But cf. *Slayton v. Fremont, E. & M. V. R. Co.*, 40 Neb. 840, 59 N. W. 510. *Brunner v. American Tel. & Tel. Co.*, 151 Pa. St. 447, 25 Atl. 29. Et vide *Neveu v. Sears*, 155 Mass. 305, 29 N. E. 472; *Fredericks v. Railroad Co.*, 157 Pa. St. 103, 27 Atl. 689.

Same—Strangers and Volunteers.

The master may be liable for the act of a stranger or volunteer. The law is by no means clear or consistent as to this point. Very frequently the volunteer becomes by some implication of assent a servant of the master. Thus, if a volunteer assist in cutting trees on the line of the master's premises, to mark it with a brush fence, and commit a trespass on a neighbor's land while the master is present, the latter may be held liable.¹³⁴ In many cases, however, the true theory would seem to be that the master is held liable, not because the stranger is his agent or servant, but because the master fails in the performance of some duty owed to third persons, and it would appear to be immaterial whether the failure be due to one in his service or not.¹³⁵ The duty of the owner to exercise commensurate care in the use and custody of a dangerous instrumentality is such that the interference therewith by a complete stranger, intruder, or mere volunteer resulting in damage to an innocent person will make the owner liable. Thus, where a railroad company left a loaded car coupled with two empty cars standing on a switch which inclined towards their main track, the same being secured by brakes and a tie placed under the wheels of the loaded car, and a person was injured by the cars running down onto the main track, it was held that the company was responsible, as a matter of law, even though the cars would not have run onto the main track but for the wrongful act of a stranger in taking away the tie.¹³⁶ Similarly, if a man leaves a quiet horse standing in the streets unguarded, and a stranger strikes him, the owner is liable for damages done by his running away.¹³⁷

Liability in Cases of Fraud.

The liability of the principal for the fraud of his agent, in many cases, rests—a sort of an estoppel—upon the fact that he has put

¹³⁴ Hill v. Morey, 26 Vt. 178; Booth v. Mister, 7 Car. & P. 66; Andrews v. Boedecker, 126 Ill. 605, 18 N. E. 651.

¹³⁵ Cleveland v. Spier, 16 C. B. (N. S.) 399.

¹³⁶ Smith v. Railroad Co., 46 N. J. Law, 7; Mars v. Delaware & H. Canal Co., 54 Hun, 625, 8 N. Y. Supp. 107; Lane v. Atlantic Works, 111 Mass. 136; Pastene v. Adams, 49 Cal. 87.

¹³⁷ Illidge v. Goodwin, 5 Car. & P. 190; Dixon v. Bell, 5 Maule & S. 198.

the agent in a position to do wrong, and should therefore suffer rather than an innocent third party.¹³⁸ The principal is liable for the means the agent uses to accomplish the ends of the principal, whether such means be fair or unfair. The agent may bind his principal within the limits, not of real, but of apparent, authority.¹³⁹ An agent's fraudulent representations as to the condition of uninspected lands, inducing a trade, makes his principal liable.¹⁴⁰ So, if the agent points out the wrong land, and the purchase is made in the belief that the land shown is the land purchased, the principal is liable.¹⁴¹

The English rule seems to be quite clear that the principal is liable for the act of his servant in the course of the principal's business only when the act of his agent is for the principal's benefit; and for fraud beyond the scope of business, if the principal has derived a benefit, but only to the extent of the benefit received.¹⁴²

In America it is recognized that a "man cannot reap the fruit of his agent's fraud and escape liability by denying the agent's authority."¹⁴³ But the master may be held liable for the fraud of his servant, though forbidden by the master, and resulting in no benefit to him, and though willful and malicious. This principle has been applied to the case of a local agent of a telegraph company who was also the agent of an express company at the same place and who sent a forged dispatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in shipping grain. The message was duly received, and the

¹³⁸ *Wolfe v. Pugh*, 101 Ind. 293-304; *Independent Bldg. & Loan Ass'n v. Real Estate Title Co.*, 156 Pa. St. 181-193, 27 Atl. 62; *Griswold v. Haven*, 25 N. Y. 595; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846; *Voorhis v. Olmstead*, 66 N. Y. 113; *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570.

¹³⁹ *Pickering v. Busk*, 15 East, 43; *Halsted v. Colvin*, 51 N. J. Eq. 387, 26 Atl. 928; *Kennedy v. McKay*, 43 N. J. Law, 288.

¹⁴⁰ *Rhoda v. Annis*, 75 Me. 17; *Jewett v. Carter*, 132 Mass. 335.

¹⁴¹ *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800; *Burke v. Railway Co.*, 83 Wis. 410, 53 N. W. 692.

¹⁴² *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Weir v. Bell*, 3 Exch. Div. 238.

¹⁴³ *Jones v. Association*, 94 Pa. St. 215. And see *Albitz v. Railway Co.*, 40 Minn. 476, 42 N. W. 394; *Ripley v. Case*, 86 Mich. 261, 49 N. W. 46.

money in good faith forwarded by express in response to the telegram, but was intercepted and appropriated by the agent. It was held that the transmission of the forged dispatch was the proximate cause of the loss, and that both companies could be sued, separately or jointly.¹⁴⁴ But, if the principal owes another no duty to protect against the fraud of his agent, he cannot be held liable for the agent's personal wrong. Thus, where a mercantile agency stipulates expressly that the veracity or correctness of the information is in nowise guaranteed, a subscriber cannot recover damages resulting from the willful and fraudulent act of a subagent in furnishing information.¹⁴⁵

70. REASON OF LIABILITY—The reason of the master's liability is not exclusively or finally—

- (a) His authority, i. e. the identification of master and servant.
- (b) His benefit, or the servant's motive.
- (c) The lawfulness of the conduct, or its unlawfulness.
- (d) *Respondeat superior*.
- (e) The propriety of making the master rather than an innocent stranger suffer for the servant's wrong.

It is a matter of great difficulty to assign any definite single reason for holding the master liable for the act of his servant. Certain negative propositions may be safely made. The authority of the master—that is, the doctrine of identification of the master and servant—answers sufficiently for a reason to torts consented to by the master, and perhaps as to torts committed in the scope of authority, actual or implied. So far as this reason is sufficient, it would seem, on final analysis, to be logically no more than a clear case of the connection of the master as the juridical cause of the injury. But as to a large class of torts committed by the servant for which the master is liable, it is clearly insufficient. Thus, it wholly fails to account for the liability where the tort is forbidden,

¹⁴⁴ *McCord v. W. U. Tel. Co.*, 39 Minn. 181, 39 N. W. 315.

¹⁴⁵ *Dun v. City Nat. Bank*, 7 C. C. A. 152, 58 Fed. 174.

especially where the servant's conduct was for his own private purpose.

It appears also that the mental attitude of the servant is not the test of liability. The master may be liable for the malicious and capricious act of his servant,—where there is involved a special relationship, as that of a common carrier to its passenger; in a case of fraud; or the custody of a dangerous thing, as a torpedo. Where, however, the service of the master did not in some way make possible the wrongdoing of the servant, and where there was no special duty resting on the master, the matter of the master's benefit and the servant's motive is properly a matter to be considered by the jury in determining whether the given conduct was within or without the course of employment. It is not necessary that the act should be for the master's benefit. On the contrary, it may result in injury to him apart from the damage done to the person charging him with the servant's wrong (as where the servant willfully drives a vehicle against a person and injures both the person and his master's vehicle).

Nor is the unlawfulness of the conduct of the servant a test of the master's liability. On the contrary, if such conduct be in pursuance of the master's command, express or implied, the servant and master may be joint tortfeasors. *Respondeat superior* is useless as a test, because it is a mere restatement of the rule. A similar (and not inconsistent) reason frequently assigned is that, the employé having done damage in course of his employment, the master rather than the third person should bear the loss.

In some cases, as conspicuously in fraud, the master may be estopped from denying his servant's authority. His liability upon the same state of facts may be regarded as a species of estoppel, based on his duty not to put it into his servant's power to do harm. The general reasoning under consideration is, however, dangerous and unsound, in that it assumes that where damage is suffered some one must pay. It is elementary that mere damage to an innocent party is not actionable. In addition to such damage it must also be shown that there was a breach of duty, and that the defendant was the juridical cause of the wrong.

71. But while most of these considerations are entitled to weight in appropriate cases, the true general reasons for the master's liability would seem to be—

- (a) That the master owes a duty to third persons which varies with circumstances;**
- (b) That he insures third persons against the violation of such duty; and**
- (c) If his servant in the course of his employment violates such duty, the master is the juridical cause of the consequent injury.**

Duty.

The variation of the duty may depend, for example, upon contract or relationship, as in case of common carriers, innkeepers, storekeepers, and the like; or upon the custody, use, or control of dangerous instrumentalities, as engines, ferocious animals, and the like; or upon the custody, use, or control of innocent instrumentalities affording the opportunity of mischief by the servant, as the possession of property used to perpetrate fraud, or the facilities of business, and the like. This idea has been clearly put in the Wisconsin cases, to the effect that liability of the master is limited to those cases where the principal owes a duty to third persons. Being responsible for the performance of this duty, if he delegates it to an agent and the agent fails to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent. The duty of the principal is equally broken by the negligent disregard or the malicious disregard of the right.¹⁴⁶ So, with respect to the liability of the employer in a case of independent contractor, it seems clear that he who has a duty to perform cannot shift the duty to the shoulders of another, and is liable for its nonperformance, although the fault may be directly attributable

¹⁴⁶ *Bass v. Railway Co.*, 42 Wis. 654; *Schaefer v. Osterbrink*, 67 Wis. 435, 30 N. W. 922. Et vide *Dillon, J.*, 24 Am. Law Rev. 177. In other words where there is conduct for which the master would be liable if he conducted his business personally, he will be liable if he conducts his business by a servant. If an agister should willfully kill a horse in a fit of temper, he would be liable to his bailor because he owes him the duty of due care. Therefore if his servant does the same thing, though commanded to take good care of the horse, the master is liable, for the master's duty is equally broken.

to another who has contracted to do the work.¹⁴⁷ Indeed, as has been shown, in some cases the master may be liable for the injurious consequences of the conduct of volunteers, interlopers, and mere trespassers.

Much misconception on the subject has arisen from the failure to realize that the master's responsibility is graduated according to the circumstances. "The degree of responsibility," says Mr. Pollock, "may be thus arranged, beginning with the mildest: (1) For one's self and specifically authorized agents (this holds always). (2) For servants or agents generally (limited to course of employment). (3) For both servants and independent contractors (duties as to safe repair, etc.). (4) For everything but vis major (exceptional: some cases of special risk, and, anomalously, certain public occupations)."

The Master an Insurer against Torts, not against Damage.

It is, perhaps, putting the duty of the master too strongly to say that he insures against commission of torts by his servants; but certainly no exercise of care on his part, either in the selection of his servants or in the formulation, promulgation, or enforcement of rules, is sufficient to exonerate him from violation of the duty he may owe third persons. "The master," said Lord Cranworth, in *Bartonshill Coal Co. v. Ried*,¹⁴⁸ "is considered as bound to guaranty third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of business." The famous reason assigned by Chief Justice Shaw in *Farwell v. Boston & W. R. Corp.*¹⁴⁹ has met with universal approval. "The rule is obviously founded on the great principle of social duty that every man in the management of his own affairs, whether by himself, his agents, or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." The insurance, however, is against the commission of torts, not against the production of damages by his servant.

Connection as Cause.

The courts which were satisfied with authority as the test, and identification as the reason, of the master's liability for his servant's

¹⁴⁷ *Tarry v. Ashton*, 1 Q. B. Div. 314; Plg. Torts, 94.

¹⁴⁸ 3 Macq. 286-283.

¹⁴⁹ 4 Metc. (Mass.) 49, Bigelow, Lead. Cas. 688.

torts, naturally did not devote much attention to the doctrine of the master's duty, or to the doctrine of connection of the master as cause. And while the cases in which the owner is held liable for the conduct of strangers dwelt on the master's original negligence, and on tracing it to him through the third person, such courts would perhaps seem to have overlooked the natural analogy of these cases and of the independent contractor cases to the liability of master and servant.

Mr. Innes has clarified the subject by insisting that a person may act directly by himself or indirectly through instrumentalities. Instrumentalities may be personal, as servant and agent, or impersonal, as a tiger or torpedo. If the right of another be violated, it is immaterial whether the violation was the direct act of the person sought to be charged or that of his instrumentality, whether animate or inanimate, rational or irrational. The servant is an instrumentality of the master. If a duty of the master be violated, he is liable alike whether he or his servant was guilty of the breach.

72. INDEPENDENT TORT—Under no test is the master liable for the independent tort of the servant.

What is his independent tort is ordinarily a question of fact for the jury.

The servant acts as a servant or as an individual. For his torts in the latter capacity—for his really independent torts—the master is no more liable than would a parent be for the independent torts of his child.¹⁵⁰ But while the servant is in the employment and commits a tort, it is not clear what deviation from the course will so interrupt the relation as to make the conduct exclusively his own, and what deviation will not allow the master to escape liability. The early statement that a slight deviation is sufficient to exonerate the master has not now the sanction of most courts. The cases occur in classes quite distinctly marked. In cases of assault, for example, while a carrier may be liable for forbidden assaults upon passengers to whom a particular duty is owed,¹⁵¹ the liability ceases when the duty ceases. Therefore an assault on a passenger after he had left

¹⁵⁰ *Hower v. Ulrich*, 156 Pa. St. 410, 27 Atl. 37.

¹⁵¹ *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 30 Atl. 560; *Texas & P. Ry. Co. v. Williams*, 10 C. C. A. 463, 62 Fed. 440.

the train creates no responsibility on the part of the railroad company.¹⁵² Nor is the company responsible for the purely personal encounter of its employes with persons between whom and the corporation there is no privity.¹⁵³ Thus, if an engineer stops his train and pursues a boy into his father's house, seizes him and carries him off on the train, the act is not in the range of the engineer's employment, and the master is not liable.¹⁵⁴ But a master is liable for the act of his clerk in assaulting another because he refused to pay for the hire of a bicycle,¹⁵⁵ or of his barkeeper in ejecting a person from his saloon.¹⁵⁶ The same distinction is drawn in the driving cases. Where the driver of the master's vehicle turns aside from the master's employment and engages in an independent journey, wholly foreign to his employment, and for a purpose exclusively his own, the master is not liable for his act. Thus, where a carman, having finished his work, returned to the shop with his vehicle and obtained the key of the stable, which was close at hand, but, instead of going at once and putting up the horse, as was his duty to do, he, without his master's knowledge or consent, took a fellow workman on a drive, in course of which he ran over a person, the master was not held responsible for his act, because at the time of the accident the servant was not engaged in the business of his master.¹⁵⁷ But where a driver, delivering porter by the barrel to a customer, at the request of the customer drove to a store to get a faucet, and by reckless driving injured another, it was held to be for the jury to determine whether or not the driver was acting within the course of his employment.¹⁵⁸

The same distinction is apparent in cases of false arrest. In these cases, as a rule, neither the master's instrumentalities, facilities, nor

¹⁵² *Central Ry. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709.

¹⁵³ *Cofield v. McCabe*, 58 Minn. 218, 59 N. W. 1005.

¹⁵⁴ *Gilliam v. Railway Co.*, 70 Ala. 268.

¹⁵⁵ *Baylis v. Schwalbach Cycle Co. (City Ct. Brook.)* 14 N. Y. Supp. 933.

¹⁵⁶ *Fortune v. Trainor*, 65 Hun, 619, 19 N. Y. Supp. 598; *Brazil v. Peterson*, 44 Minn. 212, 46 N. W. 331. Cf. *Rogahn v. Foundry Co.*, 79 Wis. 573, 48 N. W. 669, with *Smith v. Packet Co. (Tenn.)* 1 S. W. 104.

¹⁵⁷ *Mitchell v. Crassweller*, 13 C. B. 237; *Moore v. Sanborne*, 2 Mich. 520; *Courtney v. Baker*, 60 N. Y. 1; *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

¹⁵⁸ *Guinney v. Hand*, 153 Pa. St. 404, 26 Atl. 20. Cf. *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29; *Quinn v. Power*, 87 N. Y. 535.

property puts the servant in a position peculiarly enabling him to commit the wrong. It was early held in New York that the command of the master, actual or implied, was the test of liability.¹⁵⁹ It was, however, soon recognized that it was not the command of the master, but the line or course of employment, which determined liability, and the master was held liable, although the conduct of the servant exceeded authority and was something the master had not authorized.¹⁶⁰ Thus, to illustrate what is and what is not in the course of employment, it was held that the ticket agent who received good money from one whom he suspected to be a counterfeiter, and thereupon caused his arrest, was acting in his capacity as a good citizen desiring the punishment of crime, and not in the employment of the railroad company.¹⁶¹ But where a ticket agent, having disputed with one as to the amount of change passed to her, followed her to the platform, charged her with passing counterfeit money and as being a prostitute, and detained her on the platform, it was held that the agent was engaged in the company's employment in endeavoring to protect and recover its property, that the tort was not his independent wrong, and that the company was liable.¹⁶²

The question of what is within and what is without the course of employment, what is and what is not an independent tort of the servant, it seems, cannot be referred to any very definite rule. Each case rests on its own facts.¹⁶³ Whether the given conduct is within the course of employment is a question of fact, ordinarily, for the jury; but where there is no evidence that the given conduct was in course of employment, the court may take the case from the jury.

¹⁵⁹ *Mali v. Lord*, 39 N. Y. 381.

¹⁶⁰ *Lynch v. Railroad Co.*, 90 N. Y. 477.

¹⁶¹ *Mulligan v. New York & R. B. Ry. Co.*, 129 N. Y. 506, 29 N. E. 952.

¹⁶² *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 30 N. E. 1001.

¹⁶³ *Smith v. Spitz*, 156 Mass. 319, 31 N. E. 5; *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S. W. 737; *Guinney v. Hand*, 153 Pa. St. 404, 26 Atl. 20; *Brunner v. Telegraph Co.*, 151 Pa. St. 447, 25 Atl. 29; *Chicago v. Bixby*, 84 Ill. 82.

SAME—MASTER'S LIABILITY TO SERVANT.

73. The master is liable in tort to his servant for any breach of duty to his servant resulting in damage not exclusively concerning payment of wages or other consideration involved in the relationship.

A master owes to the servant the same duty to respect his person, freedom of locomotion, reputation, property, and the like which he owes third persons, from the violation of which an action *ex delicto* arises. But he owes to the servant certain duties also peculiar to the relationship. If he fail to pay the consideration for which the service is rendered, the action is *ex contractu*. Between these two extremes, there are duties owed by the master to the servant for the violation of which the law inclines to determine the remedy according to the law of torts, not contracts. Most of the questions involved in this class of cases concern negligence. Accordingly, their consideration is postponed until that specific wrong is treated.

SAME—SERVANT'S LIABILITY TO SERVANT.

74. One servant may sue another for torts committed in the course of the common employment.

It has been held that one servant is not liable in an action by another servant in the employment of the same master for damage occasioned by the negligence of the first in such employment.¹⁰⁴ The doctrine of these cases has, however, been generally rejected.¹⁰⁵ In the little community of the employes of the same employer upon the same general undertaking, the common duties of man to man in society generally should continue to exist, and, as a consequence, liability for breaches of them.¹⁰⁶

¹⁰⁴ *Southcote v. Stanley*, 1 Hurl. & N. 247; *Albro v. Jaquith*, 4 Gray, 99; *Winterbottom v. Wright*, 10 Mees. & W. 109.

¹⁰⁵ *Wiggett v. Fox*, 11 Exch. 832; *Rogers v. Overton*, 87 Ind. 410; *Hinds v. Overacker*, 66 Ind. 547; *Griffiths v. Wolfram*, 22 Minn. 185; *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. 708; *Hare v. McIntire*, 82 Me. 240, 19 Atl. 458.

¹⁰⁶ *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075; *Hinds v. Harben*, 58 Ind. 121; 2 Thomp. Neg. 1062.

SAME—LIABILITY OF SERVANT TO MASTER.

75. The servant is liable to the master for conduct wrongful to the master.

76. The servant is liable to the master for breach of duties peculiar to the relationship, consisting in failure

(a) To be loyal to his trust.

(b) To obey instructions.

(c) To exercise due care.

(d) To account for money and property.

77. Where the master has been compelled to pay out money for the wrongful and forbidden conduct of the servant, he may by legal process compel reimbursement from the latter.

The liability of the servant to the master, apart from the liability peculiar to the relationship, is that of the servant to any third person.

The servant owes to the master the duty of being loyal to his trust. An agent is liable for conversion.¹⁶⁷ The agent is bound to obey his instructions. If he fails so to do he is liable for the injury which may ensue, unless the act be illegal or immoral.¹⁶⁸ The servant is liable to the master for his negligence, for example, in making loans.¹⁶⁹

The servant is liable to the master for all damages which the master has been compelled to pay because of the wrongful act of the servant to a third person. Thus, if a conductor maltreat and damage a female passenger, and the railroad company is compelled to pay for such damage, it can recover from the conductor the

¹⁶⁷ *Greenleaf v. Egan*, 30 Minn. 316, 15 N. W. 254.

¹⁶⁸ *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Butts v. Phelps*, 79 Mo. 302.

¹⁶⁹ *Inhabitants of Westfield v. Mayo*, 122 Mass. 100. And see *Kennedy v. McCain*, 146 Pa. St. 63, 23 Atl. 322; *Brooklyn v. Railway Co.*, 47 N. Y. 475; *Friesenhahn v. Bushnell*, 47 Minn. 443, 50 N. W. 597; *Shoenfeld v. Fleisher*, 73 Ill. 404.

amount paid, including the costs and counsel fees involved in the proceedings.¹⁷⁰

78. Whether an agent is liable to the principal for the torts of a subagent depends principally on the nature of the contract. The tendency is to enlarge, not to narrow, the liability.

Where the agent or servant has employed a subagent or underservant, there is much confusion in the cases as to whether such intermediate contractor is liable for the wrong of his employés, or whether the responsibility is limited to the wrong-doing subagent and underservant and to the original master or principal.¹⁷¹ Justice Blatchford in *Exchange Nat. Bank v. Third Nat. Bank*,¹⁷² has stated with clearness the true principle of the law on this point: "The distinction recurs between the rule of merely personal representative agency and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used." It was accordingly held in this case that where a Pittsburg bank sent a draft to a New York bank, and the latter to a Newark bank, for collection, the New York bank was liable to the Pittsburg bank for the carelessness of the Newark bank.

While there is much uncertainty in the litigated cases,¹⁷³ the general principle seems to be that a bank receiving commercial paper for collection is, in the absence of a special agreement, liable for

¹⁷⁰ *Grand Trunk Ry. Co. v. Latham*, 63 Me. 177.

¹⁷¹ *St. Nicholas Bank v. State Nat. Bank* (N. Y. App.) 27 N. E. 849.

¹⁷² 112 U. S. 276-290, 5 Sup. Ct. 141.

¹⁷³ The cases are collected in *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141; *Marine Bank v. Rushmore*, 28 Ill. 463; *Wheatland v. Pryor*, 133 N. Y. 97, 30 N. E. 652.

loss occasioned by the wrong of a correspondent or agent selected by it to effect the collection.¹⁷⁴ A distinct line of cases, however, holds that where the nature of the business in which an agent is engaged requires for the purpose of a reasonable execution the employment of a subagent, the principal agent is not responsible for the default of the subagent, provided a proper subagent is selected.¹⁷⁵

SAME—LIABILITY OF SERVANT TO THIRD PERSONS.

79. A servant is liable to third persons not in the employ of his master, for all violations of duty by him, whether arising from misfeasance, malfeasance, and, it would appear, from nonfeasance, and ordinarily whether authorized or unauthorized by his master. Actually undertaking to do what failure to do would not make the servant liable to such persons, may create a duty on his part to perform that work properly.

Liability for Misfeasance and Malfeasance.

The servant is clearly liable for misfeasance and for malfeasance. If his conduct is tortious, ordinarily the authority of his master is no defense.¹⁷⁶ "For the warrant of no man, not even of the king, can excuse the doing of an illegal act; for although the commanders are trespassers, so also are the persons who did the act."¹⁷⁷

But where the mental attitude is of the essence of the wrong, ignorance on the part of the servant of the injury he was committing may exonerate him. Thus, in cases of fraud, if he make a false representation, not knowing it to be untrue, but because his

¹⁷⁴ National Exch. Bank v. Beal, 50 Fed. 355; Id., 5 C. C. A. 304, 55 Fed. 894; British & A. Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319; Bradstreet v. Everson, 72 Pa. St. 124.

¹⁷⁵ Fabens v. Bank, 23 Pick. 330; Barnard v. Coffin, 141 Mass. 37, 6 N. E. 364; Dun v. City Nat. Bank of Birmingham, 7 C. C. A. 152, 58 Fed. 174.

¹⁷⁶ Perkins v. Smith, 1 Wils. 328; Stephens v. Elwall, 4 Maule & S. 259; Knight v. Luce, 116 Mass. 586; Josselyn v. McAllister, 22 Mich. 299; Wright v. Eaton, 7 Wis. 595; Thorp v. Burling, 11 Johns. 285; Burnap v. Marsh, 13 Ill. 535.

¹⁷⁷ Sands v. Child, 3 Lev. 352, 4 Mod. 176.

master directed him, he will not be liable. But if he make the representation knowing it to be false and fraudulent, he is liable in damages.¹⁷⁸

Where the master converts property,¹⁷⁹ and the agent or servant who, acting solely for his principal or master, and by him directed, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, the property, which the latter had no right to dispose of, he is not thereby rendered liable for the conversion.¹⁸⁰

Liability for Nonfeasance.

According to Judge Story,¹⁸¹ "The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not, in general (for there are exceptions), liable to third persons for his own nonfeasances or omissions of duty in course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons, but the privity exists only between him and his principal."¹⁸² The rule comes from the famous saying of Lord Holt, in *Lane v. Sir Robert Cotton*:¹⁸³ "A servant or deputy cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not as a servant or deputy, but as a wrongdoer." Blackstone furnishes a favorite illustration: "If a servant * * * by his negligence does any damage to a stranger, the master shall answer for his neglect. If a smith's servant lames a horse while he is shoeing him, an action lies against the master, not the servant."¹⁸⁴ But the rule as there laid down has been seriously questioned.¹⁸⁵

The thinness and uncertainty of the distinction between the misfeasance, malfeasance, and nonfeasance leave an exceedingly un-

¹⁷⁸ *Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776; Story, Ag. § 310.

¹⁷⁹ *Silver v. Martin*, 59 N. H. 580.

¹⁸⁰ *Leuthold v. Fairchild*, 35 Minn. 99-111, 27 N. W. 503, and 28 N. W. 218.

¹⁸¹ Story, Ag. c. 12, § 308.

¹⁸² *Harriman v. Stowe*, 57 Mo. 93; *Brown Paper Co. v. Dean*, 123 Mass. 267; *Henshaw v. Noble*, 7 Ohio St. 226.

¹⁸³ 12 Mod. Case 796, p. 488; *New York & W. P. Tel. Co. v. Dryburg*, 35 Pa. St. 298-303.

¹⁸⁴ 1 Cooley's Bl. Comm. §§ 430, 431; *Hay v. Cohoes Co.*, 3 Barb. 42.

¹⁸⁵ Mechem, Ag. § 572; Whart. Neg. § 535.

stable basis on which to rest an important principle of liability. It would indeed seem to be a fair criticism on the subsequent reasoning that the courts have, in applying the distinction, engaged in a solemn game of logomachy. Thus, in *Bell v. Josselyn*¹⁸⁶ it was said that failure of "defendant to examine the state of the pipes in a house before causing the water to be let on would be a nonfeasance; but if he had not caused water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts were, the nonfeasance caused the act done to be a misfeasance. The plaintiff suffered from the act done, which was no less a misfeasance by the reason of its being preceded by a nonfeasance."

This solemn legal jugglery with words will probably disappear "if the nature of the duty incumbent upon the servant be considered."¹⁸⁷ If the servant owe a duty to third persons, derived from instrumentality likely to do harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission. A driver who injures a third person by his negligence is liable.¹⁸⁸ So an engineer who negligently handles fire is liable to third persons for the damage done.* Selectmen of a town who ordered the building of a public sewer in one of the streets were liable for injuries occasioned to a person employed by them to lay a pipe in the bottom of a trench, by reason of their failure to provide a proper support for the sides of the trench. The fact that the town was also liable did not relieve them.† So where the privilege was given to the master to haul wood through another's land and the master directed the servant to close the fence and the servant passed through with-

¹⁸⁶ 3 Gray, 309.

¹⁸⁷ Whittaker's *Smith, Neg.* p. 200, § 7.

¹⁸⁸ *Phelps v. Wait*, 30 N. Y. 78; *Hewett v. Swift*, 3 Allen, 420.

* *Gilson v. Collins*, 66 Ill. 138. And see *Bacheller v. Pinkham*, 68 Me. 253.

† *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075; *Kranz v. Long Island Ry. Co.*, 123 N. Y. 1, 25 N. E. 206; *Eaglesfield v. Marquis of Londonderry*, 4 Ch. Div. 693.

out closing it, and hogs escaped and were killed, the servant was held liable.¹⁸⁹

But there are circumstances which impose no duty on defendant. If the servant do nothing, he is not liable. Thus, if the master has agreed with a third party to perform a certain duty, and the servant omits to perform that duty, the third party complains of the breach of contract by the master to which the servant is no party, and there is no duty to third persons for the servant to perform.

But when the servant actually undertakes and enters upon the execution of a particular work, he is liable for any negligence in the manner of executing it. He cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffered injury by reason of his having so left it without proper safeguards.¹⁹⁰ Thus, even in cases of bailment,—for example where a mare was given into a party's keeping to be broken, and was killed by the negligence of such party's servant or agent,—the agent, as well as the principal, was liable.¹⁹¹

SAME—PARTNERS.

80. In order that responsibility be attached to a partner with respect to a tort, it is necessary either

- (a) That he should have authorized it or joined in its commission in the first instance;
- (b) That he should have made it his own by adoption; or
- (c) That it should have been committed by his copartner in the course and as a part of his employment.¹⁹²

Where a partner authorizes the commission of a tort, he has done it himself, and is of course liable. So, where he joins in its

¹⁸⁹ *Horner v. Lawrence*, 37 N. J. Law, 46.

¹⁹⁰ *Osborne v. Morgan*, 180 Mass. 102.

¹⁹¹ *Miller v. Staples*, 3 Colo. App. 93, 32 Pac. 81. Compare 3 Chit. C. & N. 214; *Lane v. Cotton*, 12 Mod. Case 796, p. 488.

¹⁹² *Lindl. Partn.* § 299.

commission, his liability is rather that of a joint tortfeasor pure and simple, because of participation, than that of a partner because of relationship.¹⁹³ Retention of benefit derived from a partner's unauthorized tort will attach liability to all partners.¹⁹⁴ The only questions involving difficulty as to the liability of partners, therefore, are those where the liability arises from the relationship. It has been recognized generally by text writers that the law of partnership is a branch of the law of agency. Consequently it is said that a partner, like a principal, is not liable for the willful acts of his agent, if not done in course of his employment and as part of his business; and this is true not only of assault, battery, libel, and the like, but also of fraud.¹⁹⁵

¹⁹³ *Graham v. Meyer*, 4 Blatchf. 129, Fed. Cas. No. 5,673.

¹⁹⁴ *U. S. v. Baxter*, 46 Fed. 350; *Blenenstok v. Ammidown* (Super. N. Y.) 29 N. Y. Supp. 593.

¹⁹⁵ *Lindl. Partn.* § 299; *Ewell's Evans*, Ag. p. 180; *Stockwell v. U. S.*, 3 Cliff. 284, Fed. Cas. No. 13,466.

CHAPTER IV.

DISCHARGE AND LIMITATION OF LIABILITY FOR TORTS.

- 81. In General.
- 82. Discharge or Limitation by Voluntary Act of Party.
- 83. By Waiver.
- 84. By Agreement.
- 85. Agreement before Damage.
- 86. Agreement after Damage.
- 87. Discharge or Limitation by Operation of Law.
- 88. Discharge by Judgment.
- 89-90. Discharge by Death.
- 91-92. Statutes of Limitation.
- 93. Compliance with Statutory Requirements.
- 94-95. Discharge of Joint Torts—Judgment.
- 96. Release.
- 97. Waiver.

IN GENERAL.

81. Liability for torts may be discharged or limited either—

- (a) By voluntary act of the party; or
- (b) By operation of law.

The distinction between discharge by act of parties and discharge by operation of law is open to criticism, inasmuch as the law only operates in conjunction with some act of the parties. Nevertheless the distinction is practically useful.

The discharge of torts may conveniently be divided, for consideration, into discharge of ordinary torts as distinguished from joint torts. Many considerations are common to both. Those peculiar to joint torts will be separately considered.

DISCHARGE OR LIMITATION BY VOLUNTARY ACT OF PARTY.

82. Liability for torts is discharged or limited by voluntary act of the party—

- (a) By waiver; or
- (b) By agreement.

SAME—BY WAIVER.**83. A tort may be discharged by waiver operating through consent or estoppel.**

Much of the uncertainty and confusion which arise in connection with the doctrine of waiver might, it would seem, be eliminated by bearing in mind, in each case, that waiver may be based either upon contract or estoppel. If it is based upon contract, the questions are as to parties, construction, and consideration. These will be subsequently discussed. If it is based upon estoppel, the questions are of fact, especially with reference to the altered position of the parties consequent upon the conduct claimed to operate by way of estoppel. Knowledge of the existence of a right, and the intention to relinquish it, must concur, to create an estoppel by waiver.¹ Acceptance of a benefit, with knowledge of wrong done, may discharge a tort by waiving it. Thus, if a person who has been induced by fraud and deceit to enter into an executory contract for the purchase of personal property, to be delivered and paid for in the future, discover the fraud while the contract is still executory, and, notwithstanding, afterwards accepts the property, under the contract, and uses it, he cannot maintain an action for damage for the fraud, or recoup them in an action for the purchase price of the property.²

As has already been seen, there are many cases in which the person against whom the wrong has been committed may waive the tort and bring *assumpsit*.³ When a father sues for the wages of his infant son, employed without his consent, he thereby ratifies the hiring, and waives the tort involved in the harboring of the son.*

¹ *Hamilton v. Home Fire Ins. Co.*, 42 Neb. 883, 61 N. W. 93. Generally, as to waiver and estoppel, see *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546.

² *Thompson v. Libby*, 36 Minn. 287, 31 N. W. 52.

³ See ante, p. 20.

* *Hopf v. Baking Co.*, 6 Misc. Rep. 158, 27 N. Y. Supp. 217.

SAME—BY AGREEMENT.

84. Discharge or limitation of liability by agreement will be considered with reference to the time of making the agreement, whether—

- (a) Before damage; or
- (b) After damage.

85. AGREEMENT BEFORE DAMAGE—While freedom of the right to contract is fully recognized by the courts, parties to a contract are generally, but not universally,

(a) Denied ability to so contract as—

(1) To escape liability in tort for negligence or fraud, with respect to a duty based on contract; or

(2) To determine in advance the amount of damage which may result from such subsequent tort, except, particularly, as to unrepeatd telegrams.

(b) Allowed to limit liability by agreement in such cases—

(1) By stipulating in advance the value of the property which may be involved;

(2) By prescribing certain reasonable duties to be performed by the injured party in the conduct involved under the contract, and as conditions precedent to right to maintain action for damages done; and

(3) By defining the physical extent of the undertaking.

On the one hand, the law recognizes the absolute right of any person to make any lawful contract he may desire to make.⁴ On

⁴ E. O. Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 20 S. W. 704; Davis v. Central Vt. R. Co., 66 Vt. 290, 29 Atl. 313; Constable v. National S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062.

the other hand, the courts reason that it is not interfering with freedom of contract to deny, for reasons of public policy, the ability to execute certain contracts limiting liability for torts.

Thus it has been generally regarded as unwise to allow any one to contract against his own negligence. The recklessness of consequences which would result from giving effect to such a provision affords a cogent reason. Moreover, in very many classes of cases the party to the contract insisting on limitations would be in a position to dictate absolutely to the party whose right to damages was being contracted away; so that such a contract would really lack the vital element of agreement,—volition. If carriers, telegraph companies, and employers generally were allowed unrestricted freedom to evade responsibility in tort by agreement, the public would be practically compelled to submit. The cases on this point arise under contract relationships, affording further reasons peculiar to each relationship. It is accordingly maintained that the ability to contract against negligence varies with the relationship involved.

Common carriers have been allowed to contract against negligence in some jurisdictions.⁵ This right, however, has been almost universally denied them.⁶ Indeed, in *Willock v. Pennsylvania R. Co.*,⁷ the court went so far as to hold that a stipulation in a bill of lading

⁵ *McCawley v. Railway Co.*, L. R. 8 Q. B. 57. But see *Manchester S. & L. R. Co. v. Brown*, 8 App. Cas. 703, per Blackburn, J.; *Peek v. Railway Co.*, 10 H. L. Cas. 473; *Magnin v. Dinmore*, 56 N. Y. 168; *Kinney v. Railway Co.*, 32 N. J. Law, 407, 34 N. J. Law, 513; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Griswold v. Railway Co.*, 53 Conn. 371, 4 Atl. 261; *Baltimore & O. Ry. v. Skeels*, 3 W. Va. 556; *Rathbone v. Railway Co.*, 140 N. Y. 48-51, 35 N. E. 418.

⁶ *Pavitt v. Lehigh Val. R. Co.*, 153 Pa. St. 302, 25 Atl. 1107. In *Railroad Co. v. Lockwood*, 17 Wall. 357, the following propositions were laid down: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable. (2) It is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) These rules apply both to the carrier of goods and to the carrier of passengers for hire, and with special force to the latter. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176; *Providence Ins. Co. v. Morse*, 150 U. S. 99, 14 Sup. Ct. 55; *Hale, Bailm. & Carr.* pp. 413, 529, collecting cases.

⁷ 166 Pa. St. 184, 30 Atl. 948. See, also, *Chicago & N. W. Ry. Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417.

that the owner, shipper, and consignee severally shall cause the goods to be insured, and that in case of loss the carrier shall have the benefit of the insurance, if such loss "shall occur from any cause which shall be held to render this line or any of its agents liable therefor," is a contract intended to protect the carrier against the consequences of its own negligence, and is void. A fortiori, a provision in a contract of shipment limiting the extent of the carrier's liability is ineffectual where the injury is caused by his gross negligence.⁸ The public character of the service rendered, and the possibility of connivance between the carrier and his servants, or between either and a third person, are considerations of public policy particularly applicable to this relation.

As to telegraph companies, the true principle would seem to be that, while they may limit liability for errors and delays resulting from atmospheric changes, or from disarrangements of line or instruments from causes which reasonable care could not avoid, they may not stipulate against their own negligence.⁹

As between employer and employé it is the generally accepted rule that an employer cannot provide by contract against damages by negligence to his employé.¹⁰ In New York it does not appear that public policy forbids the exaction by a railway from its employés of such a contract; but, in the absence of a new consideration, the contract is void for that reason.¹¹

⁸ *Wabash Ry. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Root v. New York & N. E. R. Co.*, 83 Hun, 111, 31 N. Y. Supp. 357.

⁹ *Brown v. Postal Tel. Co.*, 111 N. C. 187, 16 S. E. 179; *Fleischner v. Cable Co.*, 55 Fed. 738 (collecting cases, page 741); *W. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490; *Id.* (Tex. Civ. App.) 23 S. W. 895.

¹⁰ *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 South. 276; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 318, 15 S. E. 322; *Railway Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467; *Johnson's Adm'x v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829; *Kansas Pac. Ry. Co. v. Peavey*, 29 Kan. 169. As to limitation on liability of mercantile agencies by contract with subscriber, see *Dun v. City Nat. Bank*, 7 C. C. A. 152, 58 Fed. 174.

¹¹ *Purdy v. Rome, W. & O. R. Co.*, 125 N. Y. 209, 26 N. E. 255; *Brewer v. New York, L. E. & W. R. Co.*, 124 N. Y. 59, 26 N. E. 324. Compare *Georgia Pac. Ry. Co. v. Dooley*, 86 Ga. 294, 12 S. E. 923.

A limitation contained in a contract which stipulates that the damages to be recovered in cases of negligence of one of the parties to the contract shall not exceed a certain sum, is regarded as a discharge from a part of the liability of negligence, and is therefore invalid in those jurisdictions in which the right to contract against negligence is denied.¹² Accordingly, where a horse worth \$1,500 was shipped under a contract providing that "the liability of the company for valuable live stock shall not exceed \$100 for each animal," it was held that this was not merely an agreed value of the animal, but an attempt to limit the carrier's responsibility for negligence, and was therefore void.¹³ However, a stipulation on a telegram blank that the company will not be responsible in damages beyond the price of the message unless the message be repeated at the sender's expense has been sustained by the supreme court of the United States as reasonable and valid.¹⁴

The responsibility may be limited by an express agreement made at the time the contract is executed, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. A contract by a common carrier stipulating in advance the value of the property carried, with the rate of freight, based on the conditions that the carrier assumes liability only to the extent of the agreed value, even in cases of loss or damage by the negligence of the carrier, has been sustained,¹⁵ and

¹² *Moulton v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 85, 16 N. W. 497; *Louisville & N. Ry. Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Louisville & N. R. Co. v. Owen*, 93 Ky. 201, 19 S. W. 590; *Eells v. St. Louis, K. & N. W. Ry. Co.*, 52 Fed. 903; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311.

¹³ *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151. Et vide *Railroad Co. v. Lockwood*, 17 Wall. 357; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523, 7 Atl. 134; *Eells v. St. Louis, K. & N. W. Ry. Co.*, 52 Fed. 903; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184. Cf. *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523; *Abrams v. Milwaukee, L. S. & W. Ry. Co.*, 87 Wis. 485, 58 N. W. 780; *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 343, 4 S. W. 689; *Alair v. Northern Pac. R. Co.* 53 Minn. 160, 54 N. W. 1072.

¹⁴ *Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098. Cf. *Francis v. W. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078. But see *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298.

¹⁵ *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151; *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; *Hill v. Boston, H. T. & W. R. Co.*, 144

again held not binding.¹⁶ Courts will, however, look into attempts to limit the carrier's responsibility for negligence by stipulation as to agreed value, and will often avoid them.

The parties to a contract may specify certain reasonable requirements of the party complaining of a tort, after it has occurred, as necessary preliminaries to his right to recover. Thus, the claim for damages may be required to be made within a certain reasonable time after the alleged injury.¹⁷ If, however, the stipulation is unreasonable, as to require bringing of suit within 40 days after injury, it will not be enforced.¹⁸ Notice to the agent before the removal of live stock of claim for damages is a reasonable requirement.¹⁹

The law allows in some cases the determination of the physical extent of a contract or undertaking. Thus, intermediate carriers

Mass. 284, 10 N. E. 836 (et vide *Graves v. Railroad Co.*, 137 *Mass.* 33); *Harvey v. Terre Haute & I. R. Co.*, 74 *Mo.* 538; *Westcott v. Fargo*, 61 N. Y. 542; *Zimmer v. New York Cent. & H. R. R. Co.*, 137 N. Y. 460, 33 N. E. 642 (this is a fortiori true where the property is of a special value); *Rathbone v. New York Cent. & H. R. R. Co.*, 140 N. Y. 48, 35 N. E. 418; *Browning v. Goodrich Transp. Co.*, 78 *Wis.* 391, 47 N. W. 428; *Boorman v. Adams Exp. Co.*, 21 *Wis.* 154 (but see *Black v. Goodrich Transp. Co.*, 55 *Wis.* 319, 13 N. W. 244); *Alair v. Northern Pac. R. Co.*, 53 *Minn.* 160, 54 N. W. 1072.

¹⁶ *Weiller v. Pennsylvania R. Co.*, 134 *Pa. St.* 310, 19 *Atl.* 702 (dissenting opinion of Mitchell, J.); *Farnham v. Camden & A. R. Co.*, 55 *Pa. St.* 53. The same position would seem to have been held—not always very distinctly—in the following cases: *Southern Exp. Co. v. Seide*, 67 *Miss.* 609, 7 *South.* 547; *United States Exp. Co. v. Backman*, 28 *Ohio St.* 144; *The Lydian Monarch*, 23 *Fed.* 298; *M. P. R. Co. v. Barnes*, 2 *Willson, Civ. Cas. Ct. App.* 507; *Baughman v. Louisville, E. & St. L. R. Co.*, 94 *Ky.* 150, 21 *S. W.* 757; Et vide *Louisville & N. R. Co. v. Owen*, 93 *Ky.* 201, 19 *S. W.* 590.

¹⁷ *Lewis v. Great Western Ry. Co.*, 5 *Hurl. & N.* 867; *W. U. Tel. Co. v. James*, 90 *Ga.* 254, 16 *S. E.* 83 (60 days within which to present claims sustained); *Express Co. v. Caldwell*, 21 *Wall.* 264; *Selby v. Wilmington & W. R. Co.*, 113 N. C. 588, 18 *S. E.* 88; *Wolf v. W. U. Tel. Co.*, 62 *Pa. St.* 83; *Young v. W. U. Tel. Co.*, 65 N. Y. 163.

¹⁸ *Gulf, C. & S. F. Ry. Co. v. Hume*, 6 *Tex. Civ. App.* 653, 24 *S. W.* 915, 27 *S. W.* 110; *Gulf, C. & S. F. Ry. Co. v. Elliott* (*Tex. Civ. App.*) 26 *S. W.* 636. And see *McCarty v. Gulf, C. & S. F. Ry. Co.*, 79 *Tex.* 33, 15 *S. W.* 164; *Francis v. W. U. Tel. Co.*, 58 *Minn.* 252, 59 N. W. 1078; 10 days' time reasonable, *Case v. Cleveland, C., C. & St. L. Ry. Co.*, 11 *Ind. App.* 517, 39 N. E. 426.

¹⁹ *Selby v. Wilmington & W. R. Co.*, 113 N. C. 588, 18 *S. E.* 88.

may limit their liability to injuries occurring to through freight to the time it is on its own line.²⁰

But a limitation, when allowed by law to be binding, must have been assented to by the parties to the contract. It is strictly construed, and must be proved by the party claiming advantage under it.

86. AGREEMENT AFTER DAMAGE—A cause of action sounding in tort may be settled and discharged by agreement of the wrongdoer and the sufferer. In order that such an agreement may operate as a bar to the suit in tort of the sufferer, three things are necessary:

- (a) It must be executed by all necessary parties, and by the legal representatives of persons incapacitated, or by the legal representatives whenever required by statute, as in cases of death by wrongful act.
- (b) It must be founded on a sufficient consideration.
- (c) It must show a completed intention to discharge the particular cause of action in issue.

Form of Agreement.

The agreement discharging a cause of action in tort may take one or more of several not essentially different forms. It may be a compromise,²¹ or an accord and satisfaction,²² or a formal release,

²⁰ *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607; *Rogers v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.) 28 S. W. 1024; *International & G. N. R. Co. v. Thornton*, 3 Tex. Civ. App. 197, 22 S. W. 67; *Dunbar v. Railway Co.*, 36 S. C. 110, 15 S. E. 357; *McCarn v. International & G. N. R. Co.*, 84 Tex. 352, 19 S. W. 547; *McEacheran v. Michigan Cent. R. Co.*, 101 Mich. 264, 59 N. W. 612; *Wehmann v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 58 Minn. 22, 59 N. W. 546; *Southard v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 60 Minn. 382, 62 N. W. 442.

²¹ *Shaw v. Chicago, R. I. & P. Ry. Co.*, 82 Iowa, 199, 47 N. W. 1004; *Dunbar v. Tirey* (Tex. App.) 17 S. W. 1116. Compromise of claim to prevent litigation is binding, although such claim is not legal. *Bement v. May*, 135 Ind. 664, 34 N. E. 327, and 35 N. E. 387.

²² *McKeen v. Morse*, 1 C. C. A. 237, 49 Fed. 253; *Ahrens v. United Growers Co.* (City Ct. N. Y.) 31 N. Y. Supp. 997; *Ball v. McGeoch*, 81 Wis. 160, 51 N. W. 443.

with or without seal,²³ or a covenant not to sue,²⁴ or a ratified settlement, even if fraudulent.²⁵ The agreement claimed to operate as a discharge, in whatever form it exists, is a matter of affirmative defense, and must be specially pleaded.

Parties.

The agreement releasing a cause of action based on tort must be executed by all the necessary, and by only the competent, parties. A lunatic, injured in a wreck, cannot execute a release for damages suffered.²⁶ Even drunkenness, taking away knowledge of what the drunkard is doing, or that he was signing a release, may vitiate it.²⁷ Capacity to execute a release is ordinarily a question of fact for the jury.²⁸ A wife's release of a cause of action peculiarly her own, arising out of injuries to her person, does not discharge liability to her husband for the same wrong.²⁹ Ordinarily, an infant may avoid any release he may execute, as he may any other contract. Release by a parent of personal injury to a minor can operate only as a release of damage suffered by the parent, not by the minor.³⁰ To fully satisfy all causes of action, a release should be obtained, not only from the parents, as to their separate causes of action, but also from the legally appointed guardian of the infant. On the same principle, where, upon death by tort, a right of action accrues to the next of kin, or other statutory beneficiaries, only legally constituted authorities can execute a release. A brother-in-law cannot;³¹ nor the

²³ *Phillips v. Clagett*, 11 Mees. & W. 84.

²⁴ *Ford v. Beech*, 11 Q. B. 852, 871.

²⁵ *Drohan v. Lake Shore & M. S. Ry. Co.*, 162 Mass. 435, 38 N. E. 1116.

²⁶ *Missouri Pac. Ry. Co. v. Brazzil*, 72 Tex. 233, 10 S. W. 403; *Texas & P. Ry. Co. v. Crow*, 3 Tex. Civ. App. 266, 22 S. W. 928; *Johnson v. Merry Mount Granite Co.*, 53 Fed. 569.

²⁷ *Houston & T. C. Ry. Co. v. Tierney*, 72 Tex. 312, 12 S. W. 586. One under the influence of opiates at time of executing a release for torts may avoid it. *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120.

²⁸ *Gibson v. Western New York & P. R. Co.*, 164 Pa. St. 142, 30 Atl. 308.

²⁹ *Schouler*, Dom. Rel. § 77.

³⁰ *International & G. N. Ry. Co. v. Hinzle*, 82 Tex. 623, 18 S. W. 681; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581.

³¹ *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878, overruling (*Super. N. Y.*) 10 N. Y. Supp. 900.

widow.³² The person authorized by statute to sue for the injuries complained of (as the special administrator for widow and next of kin of a man killed by wrongful act, or a guardian ad litem of an infant or insane person), and the attorney of record in the suit brought, may undoubtedly execute a proper release or satisfy a judgment entered after trial or on stipulation, or may execute a release, especially when directed so to do by the court appointing such person executor or guardian.³³ Acceptance by a widow of benefits from a railroad relief association does not bar action by her, as administratrix, on behalf of her children.³⁴

Consideration.

There must be a consideration. A mere gratuity is not sufficient.³⁵ Thus, the voluntary payment of wages, merely as wages, by a master to an employé injured by the master's alleged negligence, does not constitute a satisfaction of the cause of action.³⁶ But a receipt of a stated sum of money, even in the absence of an express agreement that it shall be in satisfaction of such a cause of action, will be presumed to be a full recompense for the injury.³⁷ A promise to re-employ or to keep in employment is a sufficient consideration.³⁸ Where a sum certain is to be paid, a lesser sum cannot be paid by the debtor in satisfaction of a greater;³⁹ but where the

³² Knoxville, C. G. & L. R. Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348; Yelton v. Railroad Co., 134 Ind. 414, 33 N. E. 629.

³³ 2 Chlt. Pl. (16th Am. Ed.) 455; Maness v. Henry, 96 Ala. 454, 11 South. 410.

³⁴ Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120. And see State v. Baltimore & O. R. Co., 36 Fed. 655.

³⁵ Sleber v. Amunson, 78 Wis. 679, 47 N. W. 1126.

³⁶ Sobleski v. St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863. Further, as to what is not sufficient, Richmond & D. R. Co. v. Walker, 92 Ga. 483, 17 S. E. 604; Landon v. Hutton, 50 N. J. Eq. 500, 25 Atl. 953; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514.

³⁷ Hinkle v. Minneapolis & St. L. Ry. Co., 31 Minn. 434, 18 N. W. 275.

³⁸ Hobbs v. Electric Light Co., 75 Mich. 550, 42 N. W. 965; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802; Conner v. Dundee Chemical Works (N. J. Ch.) 17 Atl. 975; White v. Richmond & D. R. Co., 110 N. C. 456, 15 S. E. 197. And see Smith v. St. Paul & D. Ry. Co., 60 Minn. 330, 62 N. W. 392. Cf. Myron v. Union R. Co. (R. I.) 32 Atl. 165.

³⁹ Pinnel's Case, 5 Coke, 117a, 238; Foakes v. Beer, 9 App. Cas. 605; Jaffray

claim is for unliquidated damages, or is uncertain, a less sum may be paid and accepted in satisfaction.⁴⁰ But, even with respect to unliquidated damages, the amount of the consideration may be material as evidence of fraud or mistake.⁴¹ A seal sufficiently imports a consideration,⁴² but may be inquired into upon an allegation of fraud.⁴³

Intent to Discharge Wrong in Issue.

An agreement as to satisfaction of a claim based on a tort is governed by ordinary principles of contract. Words employed in a release will receive a fair construction, but will not be extended beyond the consideration. Otherwise, a release would be made for the parties where they never intended or contemplated one.⁴⁴ The agreement may be conditional. It may fail to cover cause of action in issue. A release of all claims and demands, "from the beginning of the world to this day," does not cover injuries not therein mentioned, and not known to exist at the time the release was executed.⁴⁵ But a simple receipt in full—for example, "\$15 in full for damages sustained by a bull hooking a horse"—is a sufficient discharge.⁴⁶

The person executing the agreement claimed as a release of a cause of action sounding in tort may, notwithstanding it, maintain his action if he can show that the release had been obtained by such

v. Davis, 124 N. Y. 164, 26 N. E. 351. Cf. Perkins v. Lockwood, 100 Mass. 249, with Weber v. Couch, 134 Mass. 26; Bird v. Smith, 34 Me. 63. But see Schweider v. Lang, 29 Minn. 254, 13 N. W. 33; Thurber v. Sprague, 17 R. I. 634, 24 Atl. 48. Cf. Savage v. Everman, 70 Pa. St. 315.

⁴⁰ Adams v. Tapling, 4 Mod. 88; Hinkle v. Railway Co., 31 Minn. 434, 18 N. W. 275; Preston v. Grant, 34 Vt. 201; Stockton v. Frey, 4 Gill. (Md.) 406; Donohue v. Woodbury, 6 Cush. 148; Renihan v. Wright, 125 Ind. 536, 25 N. E. 822; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034.

⁴¹ Byers v. Nashville, C. & St. L. Ry. Co., 94 Tenn. 345, 29 S. W. 128; Aliston v. Nashville, C. & St. L. R. Co., Id.

⁴² Spitze v. Baltimore & O. R. Co., 75 Md. 162, 23 Atl. 307.

⁴³ Waln v. Waln, 53 N. J. Law, 429, 22 Atl. 203.

⁴⁴ Coddling v. Wood, 112 Pa. St. 371, 3 Atl. 455; Fidelity Title & Trust Co. v. People's Natural Gas Co., 150 Pa. St. 8, 24 Atl. 339. Malprosecution. Kirchner v. New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104; Duff v. Hutchinson, 57 Hun, 152, 10 N. Y. Supp. 857.

⁴⁵ Union Pac. R. Co. v. Artist, 9 C. C. A. 14, 60 Fed. 365.

⁴⁶ Currier v. Bilger, 149 Pa. St. 109, 24 Atl. 168; Battle v. McArthur, 49 Fed. 715; Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556.

fraud of the defendant as will entitle him to have it set aside (in many jurisdictions, without return of what was paid under it by the tortfeasor), if he act without laches in asking for a rescission. Such an agreement may be rescinded in the same action which awards damages for the wrong done.

DISCHARGE OR LIMITATION BY OPERATION OF LAW.

87. Liability for torts may be discharged by operation of law by

- (a) Judgment;
- (b) Death of either party;
- (c) Statutes of limitation;
- (d) Compliance with statutory provisions.

SAME—DISCHARGE BY JUDGMENT.

88. A tort is discharged by a judgment rendered in a former action, although the form of action may have been different, provided

- (a) The court had jurisdiction;
- (b) The action was between the same parties, and on the same cause of action; and
- (c) The judgment was on the merits, and final.

Reason.

When an action is brought, and the plaintiff recovers judgment, the original right in respect to which he sues is merged in the higher and better right which he attains by his judgment. It being gone, the party may proceed to obtain its fruits by execution, or to revive it by a fresh action on his judgment. "For you shall not bring the same cause of action twice to a final determination; 'Nemo debet bis vexari pro eadem causa;' and what is the same cause of action is where the same evidence will support both actions." ⁴⁷ "Interest reipublicæ ut sit finis litium." ⁴⁸

⁴⁷ Kitchen v. Campbell, 3 Wills. 304. The principle does not apply to ejectment. Eichert v. Schaffer, 161 Pa. St. 519, 29 Atl. 393.

⁴⁸ Broom, Leg. Max. 331, 343; 2 Co. Litt. 303.

But a judgment rendered without jurisdiction does not establish the plea *res judicata*.⁴⁹

Identity of Parties and Causes of Action.

It is only when the causes of action in two suits are identical that the recovery of judgment in one can be a bar to the other.

A judgment in an action against the lessee for a breach of the covenant to pay rent is not a bar to an action for damages for negligence in the care of the premises.⁵⁰

It is generally true that where a party, claiming to have been injured, has an option of using one of several modes of legal redress, elects to take one, which is adequate, and prosecutes the same to a final judgment, he cannot subsequently resort to another legal proceeding for the same wrong.⁵¹ But if he seek in vain to rescind a contract, for fraud, he may subsequently sue for damages.⁵²

However, the subject-matter may be the same, but the causes of action (and not merely the forms of procedure) may be different.⁵³ Therefore judgment in an action for false imprisonment may not be a bar to an action for malicious prosecution arising from the same state of facts.⁵⁴ A fortiori, this is true where the wrongful conduct may be the same, but the parties to the judicial proceeding are different, or parties claim under different rights.⁵⁵ The mere fact

⁴⁹ *Attorney General v. Eriché* [1893] App. Cas. 518; *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54; *Winchester v. County Com'rs*, 78 Md. 266, 27 Atl. 1075. Cf. *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056.

⁵⁰ *Wright v. Tileston*, 60 Minn. 34, 61 N. W. 823.

⁵¹ *Thomas v. Joslin*, 36 Minn. 1, 29 N. W. 344; *Sanger v. Wood*, 3 Johns. Ch. 416; *Washburn v. Insurance Co.*, 114 Mass. 175; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346.

⁵² Cf. *Marshall v. Gilman*, 47 Minn. 131, 49 N. W. 688; *Savings Bank of St. Paul v. Authler*, 52 Minn. 98, 53 N. W. 812. And see *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799.

⁵³ *Spear v. Tidball*, 40 Neb. 107, 58 N. W. 708; *Ahl v. Goodhart*, 161 Pa. St. 455, 29 Atl. 82. A recovery by wife for personal injury to herself does not bar her husband. *Watson v. Texas & P. Ry. Co.*, 8 Tex. Civ. App. 144, 27 S. W. 924; *Texas & P. Ry. Co. v. Nelson* (Tex. Civ. App.) 29 S. W. 78.

⁵⁴ *Post*, p. 359.

⁵⁵ *Furlong v. Banta*, 80 Hun, 248, 29 N. Y. Supp. 985; *Allison v. Little*, 93 Ala. 150, 9 South. 388. The right of a posthumous child to recover damages for the death of his father, caused by wrongful negligence, is not barred by a

that the injured person at the time of recovery of judgment did not recover all the damage consequent upon the wrong, will not save him from the bar of the first judgment. Thus, where, after the first judgment was rendered in an action of assault and battery, a piece of the injured person's skull came out, the original judgment was a bar to another action.⁵⁶ But the repetition of a trespass or the continuance of a nuisance may constitute a new cause of action.⁵⁷ The test is whether, on the cause alleged in the action on which the judgment is founded, the damage sued for in the second could have been recovered.⁵⁸

Final Judgment on the Merits.

A mere common-law nonsuit is not a determination of the cause on the merits, and therefore does not bar another action;⁵⁹ nor does a judgment of dismissal, on the plaintiff's own motion, without the defendant's consent, bar another action for the same purpose.⁶⁰ If, before the final submission of the case to the jury, the court dismiss it, this, it seems, is a common-law nonsuit, and does not bar subsequent action.⁶¹ No judgment operates as an estoppel unless it is a judgment on the merits.⁶²

previous recovery by other parties of the damages sustained by them. *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 14 S. W. 1021. Recovery by a husband for injuries to himself is not a bar to a subsequent action for injuries to his wife, sustained at the same time, as a result of the same negligence. *Texas & P. Ry. Co. v. Nelson* (Tex. Civ. App.) 29 S. W. 78.

⁵⁶ *Fetter v. Beal*, 1 Ld. Raym. 339, 692. See, also, *Horton v. New York Cent. & H. R. R. Co.* (C. C.) 63 Fed. 897.

⁵⁷ Post, p. 223.

⁵⁸ Clerk & L. Torts, 120.

⁵⁹ *Merrick v. Hill*, 77 Hun, 30, 28 N. Y. Supp. 237. A nonsuit is but like the blowing out of a candle, which a man, at his own pleasure, may light again. *Clapp v. Thomas*, 5 Allen (Mass.) 158, 160. And see *Lindvall v. Woods*, 47 Fed. 195; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.

⁶⁰ *Pierce v. Hilton*, 102 Cal. 276, 36 Pac. 595. As to common-law retraxit, see *Walker v. St. Paul City R. Co.*, 52 Minn. 127-130, 53 N. W. 1068.

⁶¹ *Craver v. Christian*, 34 Minn. 397, 26 N. W. 8.

⁶² *Taylor v. Larkin*, 12 Mo. 103; *Houston v. Musgrove*, 35 Tex. 594; *Verhein v. Schultz*, 57 Mo. 326; *Jordan v. Siefert*, 126 Mass. 25.

SAME—DISCHARGE BY DEATH.

89. At common law, liability in tort was discharged by the death of either the person who did the wrong or the person who suffered the wrong.

At common law, the right of action for an injury to the person abates upon the death of the party injured, the case falling within the familiar rule, "*Actio personalis moritur cum persona.*" Hence, where death results, whether instantaneously or not, from such an injury, no action can be maintained by the personal representative of the party injured to recover damages suffered by the decedent. Liability was likewise discharged when the tortfeasor died.⁶³ The reason given by Blackstone⁶⁴ is that "neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury." Process in tort was a substitute for private war, and was against the man, not against the estate. "If one doth a trespass to me, and dieth, the act is dead also, because it should be inconvenient to recover against one who was not a party to the wrong."⁶⁵ A number of early English statutes modified the rule so far as to allow executors or administrators the same action for injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to executors or administrators, as the deceased might have had.⁶⁶ This right was extended to cases where injury was done to the freehold of the person who subsequently dies.⁶⁷ Apart from these statutes, a remedy for the wrongful act can be pursued against the estate of the person by whom the act was committed when the property or proceeds of the property belonging to another have been appropriated by the deceased person.⁶⁸ Indeed,

⁶³ 2 Inst. 301; Williams, Ex'rs (8th Ed.) pt. 4, bk. 2; Overend v. Gurney, 4 Oh. App. 701.

⁶⁴ 3 Bl. Comm. 302.

⁶⁵ Y. B. (1440) 19 Hen. VII.

⁶⁶ 4 Edw. III. c. 725; 5 Edw. III. c. 5.

⁶⁷ 3 & 4 Wm. IV. c. 42; Hatchard v. Mege, 18 Q. B. Div. 771; Kirk v. Todd, 21 Ch. Div. 484-488.

⁶⁸ Powell v. Rees, 7 Adol. & E. 428; Phillips v. Homfray, 24 Ch. Div. 439 (Baggallay, L. J., dissenting); Ashley v. Taylor, 10 Ch. Div. 768. Compare

the English courts have gone very far towards limiting the discharge by death to cases of mere personal torts.⁶⁹ The maxim does not apply where the cause of action arises *ex contractu*.⁷⁰ In cases of quasi tort,—as, for example, where death is caused by the breach of a carrier's contract for safe carriage,—the executor or administrator of deceased, although he could not sue in tort, might sue in contract, and recover damages.⁷¹ Nor did it apply to damage to property, as distinguished from person.

89a. At common law, the death of a human being would not support an action, even by the master, parent, or husband of deceased, to recover damages for the loss of services or society of deceased.

History of Rule.

In 1606, in *Higgins v. Butcher*,⁷² where the defendant had assaulted and beaten the plaintiff's wife, from which she died, it was held that the plaintiff could not recover. The declaration was for damage to the wife. All the case decided was that, where the person to whom a wrong is done dies, the action dies. The question was not raised again in England until 1808, when in *Baker v. Bolton*,⁷³ Lord Ellenborough laid down his famous proposition, that "in a civil court the death of a human being could not be complained of as an injury." The law was extended in *Osborn v. Gillett*,⁷⁴ by holding that while a master can sue for injury done his servant by wrongful act or negligence, whereby the service of the servant is lost

with *Hambly v. Trott*, 6 Mod. 127, note; *Baily v. Birtles*, T. Raym. 71; *Perkinson v. Gilford*, Cro. Car. 539.

⁶⁹ *Pulling v. Great Eastern Ry. Co.*, 9 Q. B. Div. 110 (commenting on *Twycross v. Grant*, 4 C. P. Div. 40).

⁷⁰ *Williams, Ex'rs* (8th Ed.) p. 87.

⁷¹ *Knights v. Quarles*, 2 Brod. & B. 102; *Potter v. Metropolitan Dist. Ry. Co.*, 30 Law T. (N. S.) 765; *Bradshaw v. Lancashire & Y. R. Co.*, L. R. 10 C. P. 189; *Leggott v. Great Northern Ry. Co.*, 1 Q. B. Div. 599. Doctrine sustained in *The City of Brussels*, 6 Ben. 370, Fed. Cas. No. 2,745; *Winnegar's Adm'r v. Central Passenger Ry. Co.*, 85 Ky. 547, 4 S. W. 237. It was held not to apply to personal injury inflicted by a deceased surgeon. *Vittum v. Gilman*, 48 N. H. 416; *Jenkins v. French*, 58 N. H. 532. Et vide *Cregin v. Brooklyn Crosstown R. Co.*, 75 N. Y. 192, 83 N. Y. 595.

⁷² *Yelv.* 89.

⁷³ 1 Camp. 493.

⁷⁴ L. R. 8 Exch. 88.

to his master, still, if the injury result in the servant's death, the master's compensation is gone.

The early American cases were not in accord with *Baker v. Bolton*.⁷⁵ The common-law rule, however, has been unanimously accepted by the courts of the various states and of the United States.⁷⁶

Reason of Rule.

None of the many reasons assigned for the rule has been generally accepted as satisfactory.

In England it has been urged that the rule is based on the merger of the wrong resulting in death into the felony involved. The sufficiency of this reason has been denied in England, and in America the doctrine has been generally repudiated.⁷⁷ Forfeiture,⁷⁸ as an explanation, is as objectionable.⁷⁹ "Actio personalis moritur cum persona" is not an explanation of the rule. It does not apply to any one not a party to the action, as the master, parent, or husband.⁸⁰ Public policy, that enlightened nations are unwilling to set a price on human life, that the value of life is too great to be estimated in money, or that the law refuses to recognize the interest of one person in the death of another, are all unsatisfactory, if not absurd, reasons.⁸¹ It is of no practical utility to search further for the

⁷⁵ Tiff. Death Wrongf. Act, § 6; *Cross v. Guthery* (1794) 2 Root, 90; *Ford v. Monroe* (1838) 20 Wend. 210; *Plummer v. Webb* (1825) 1 Ware, 69, Fed. Cas. No. 11,234; *Carey v. Berkshire Ry. Co.* (1848) 1 Cush. 475. See *Palfrey v. Portland, S. & P. R. Co.*, 4 Allen, 55; *Eden v. Lexington & F. R. Co.* (1853) 14 B. Mon. 204; *James v. Christy* (1853) 18 Mo. 162; *Shields v. Yonge*, 15 Ga. 349; *Chick v. Railway Co.*, 57 Ga. 357; *McDowell v. Railway Co.*, 60 Ga. 320; *Sullivan v. Union Pac. R. Co.*, 3 Dill. 334, Fed. Cas. No. 13,599; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Cutting v. Seabury*, 1 Spr. 522, Fed. Cas. No. 3,521; *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754.

⁷⁶ *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265; *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754; *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. 818-824; *The Corsair*, 145 U. S. 335-344, 12 Sup. Ct. 949; *Hyatt v. Adams*, 16 Mich. 180-185; Tiff. Death Wrongf. Act, §§ 11, 13, 14.

⁷⁷ *Hyatt v. Adams*, 16 Mich. 180; *Carey v. Berkshire R. Co.*, 1 Cush. 475; 2 Bish. Cr. Law (2d Ed.) § 270.

⁷⁸ *Shields v. Yonge*, 15 Ga. 349.

⁷⁹ *Grosso v. Delaware, L. & W. R. Co.*, 50 N. J. Law, 317, 13 Atl. 233.

⁸⁰ *Green v. Hudson River R. Co.*, *41 N. Y. 294, 28 Barb. 9.

⁸¹ *Osborn v. Gillett*, L. R. 8 Exch. 88; Smith, Neg. (2d Ed.) 256; *Hyatt v. Adams*, 16 Mich. 180; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265.

reason of the rule.* The rule is barbarous, and rests on adjudication, in fact.

90. Except as modified by statute, the common-law rule as to discharge by death remains in force. But, almost universally, direct legislation has practically abrogated it by creating a new action.

The English statute ("Lord Campbell's Act") for compensating the families of persons killed by accident was passed in 1846. Statutes similar to this have been passed by most of the states of the United States of America and by many of the provinces of Canada.⁸²

These acts do not repeal nor create an exception to the common law. "A totally new action," said Lord Blackburn,⁸³ "is given against the person who would have been responsible to the deceased if the deceased had lived,—an action which * * * is new in its species, new in its quality, new in its principle, in every way new, and which can be brought by a person answering the description of the widow, parent, or child who, under such circumstances, has suffered pecuniary loss."

Except so far as modified by statute, the common-law rule as to effect of death on causes of action sounding in tort remains in full effect. Accordingly, unless the statute expressly provides to the contrary, a cause of action sounding in tort, and not falling within the common-law exceptions, abates on the death of the wrongdoer, and cannot be maintained against his personal representatives.⁸⁴

The Statutory Action.

In order that a cause of action under Lord Campbell's act and similar statutes shall exist, it is ordinarily necessary that the following circumstances concur: (1) That the death shall have been caused

* Leonard, J., in *Green v. Hudson River R. Co.*, 41 N. Y. 294.

⁸² Tiff. Death Wrongf. Act, p. xvii. (Analytical Table of Statutes).

⁸³ *Seward v. Vera Cruz*, 10 App. Cas. 59; *Blake v. Midland Ry. Co.*, 18 Q. B. 93, 21 Law J. Q. B. 233; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Littlewood v. Mayor, etc.*, 89 N. Y. 24.

⁸⁴ *Green v. Thompson*, 26 Minn. 500, 5 N. W. 376. Compare *Yertore v. Wiswall*, 16 How. Prac. 8, and *Doedt v. Wiswall*, 15 How. Prac. 128, with *Norton v. Wiswall*, 14 How. Prac. 42, and *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787; *Moriarty v. Bartlett*, 99 N. Y. 651, 1 N. E. 794.

by such wrongful act, neglect, or default of the defendant that an action might have been maintained therefor by the party injured, if death had not ensued;⁸⁵ (2) that there be in existence some one of the persons for whose benefit the action may be brought; (3) that the actual party plaintiff be such a one as the statute prescribes; (4) that the time within which the action must be brought has not elapsed; and (5), according to some authorities, that the beneficiaries, or some one of them, shall have suffered pecuniary loss by reason of the death.⁸⁶

In order that recovery may be had by statutory parties, the conduct complained of, and producing the death, must have the essential elements of a tort, so that the party injured might himself have maintained the action. There must be a breach of duty by the defendant.⁸⁷ The breach of duty must be the proximate legal cause of the death.⁸⁸ The plaintiff must not have disintitiled himself by his own act.⁸⁹

In order that there may be a recovery, it is necessary that the statutory beneficiaries exist at the time the action is brought.⁹⁰

⁸⁵ *Burnham v. Stone*, 101 Cal. 164, 35 Pac. 627. But the variations in statutory enactments appear conspicuously in this: That sometimes the statutory plaintiff (as the widow or next of kin) can recover when the deceased could not had he been merely hurt, not killed. *Clark v. Railway Co.*, 160 Mass. 39, 35 N. E. 104.

⁸⁶ Tiff. Death Wrongf. Act, § 60.

⁸⁷ See ante, c. 1; *Simmons v. Elverson*, 124 N. Y. 319, 26 N. E. 911.

⁸⁸ *Jackson v. St. Louis, I. M. & S. Ry. Co.*, 87 Mo. 422; *Railway Co. v. Valleley*, 32 Ohio St. 345; *Haley v. Chicago & N. W. Ry. Co.*, 21 Iowa, 15.

⁸⁹ Thus, if it be charged that death was caused by assault and battery, self-defense might be a justification. *Besenecker v. Sale*, 8 Mo. App. 211. Compare *Nichols v. Winfrey*, 79 Mo. 544; *Brooks v. Haslam*, 65 Cal. 421, 4 Pac. 399. If the deceased has been guilty of contributory negligence, it is generally held that the statutory beneficiaries cannot succeed. *Pennsylvania R. Co. v. Bell*, 122 Pa. St. 58, 15 Atl. 561; *Central Railroad & Banking Co. v. Kitchens*, 83 Ga. 83, 9 S. E. 827; *Gay v. Winter*, 34 Cal. 153; *Quinn v. New York, N. H. & H. R. Co.*, 56 Conn. 44, 12 Atl. 97; *Newman v. Railway Co.*, 80 Iowa, 672, 45 N. W. 1054. Contra in Iowa, Virginia, and Ohio. Tiff. Death Wrongf. Act, §§ 69-71. Contributory negligence of personal representatives, unless they are the sole beneficiaries, is no bar. *Indiana Manuf'g Co. v. Millican*, 87 Ind. 87. Contributory negligence of parents, in an action by them, is a bar. Tiff. Death Wrongf. Act, § 70. But see *Clark v. Railway Co.*, 160 Mass. 39, 35 N. E. 104.

⁹⁰ *Woodward v. Railway Co.*, 23 Wis. 400; *Wiltse v. Town of Tilden*, 77

These beneficiaries are usually the widow and next of kin. It is sufficient if there be either the widow or next of kin. It is not necessary that there should be both.⁹¹ A posthumous child is next of kin.⁹² An illegitimate child is generally not within the act.⁹³ It would seem that the husband is not included in the next of kin, unless the statute expressly give him the right of action.⁹⁴ It is not necessary that the beneficiaries should be residents of the state under whose law the remedy is sought.⁹⁵

The statutes usually provide who shall be the party plaintiff. When the personal representatives of the deceased are so named, and bring suit, they have no beneficial interest in the recovery, but are merely conduits for the transmission of money recovered on the judgment to the persons beneficially entitled to recover.⁹⁶ The right to sue is confined to the persons authorized by statute. The beneficiaries cannot sue when the statute authorizes suit by personal representatives;⁹⁷ and, on the other hand, the personal represen-

Wis. 152, 46 N. W. 234; *Barnum v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 461, 16 N. W. 364. It is otherwise, however, in West Virginia and North Carolina. *Tiff. Death Wrongf. Act*, § 81.

⁹¹ *City of Chicago v. Major*, 18 Ill. 349; *McMahon v. City of New York*, 33 N. Y. 642; *Haggerty v. Central R. Co.*, 31 N. J. Law, 349.

⁹² *Texas & P. Ry. Co. v. Robertson*, 82 Tex. 657, 17 S. W. 1041.

⁹³ *Dickinson v. Railway Co.*, 33 Law J. Exch. 91; *Good v. Towns*, 56 Vt. 410; *Marshall v. Wabash R. Co.*, 46 Fed. 269.

⁹⁴ Compare *Dickins v. New York Cent. R. Co.*, 23 N. Y. 158, with *Drake v. Gilmore*, 52 N. Y. 389. And see *Warren v. Englehart*, 13 Neb. 283, 13 N. W. 401; *Steel v. Kurtz*, 28 Ohio St. 191; *Bream v. Brown*, 5 Cold. 168; *Traford v. Adams Exp. Co.*, 8 Lea, 96; *East Tennessee, V. & G. Ry. Co. v. Lilly*, 90 Tenn. 563, 18 S. W. 243. Parties, heirs at law, *St. Louis, I. M. & S. Ry. Co. v. Needham*, 3 C. C. A. 120, 52 Fed. 371. Parent, *Grimsley v. Hankins*, 46 Fed. 400 (Code Ala. 1886, § 2588). Widower not, *Gen. St. Kan. 1889*, par. 4518; *W. U. Tel. Co. v. McGill*, 6 C. C. A. 521, 57 Fed. 699. Mother, for death of bastard child, *Marshall v. Railroad Co.*, 46 Fed. 269 (*Rev. St. Mo. 1889*, § 4425). Personal representative of nonresident, *Maysville St. R. & T. Co. v. Marvin*, 8 C. C. A. 21, 59 Fed. 91. Cf. *Id.*, 49 Fed. 436.

⁹⁵ *Philpott v. Missouri Pac. Ry.*, 85 Mo. 164; *Luke v. Calhoun Co.*, 52 Ala. 115; *Chesapeake Ry. v. Higgins*, 85 Tenn. 620, 4 S. W. 47.

⁹⁶ *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599; *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787; *Lamphear v. Buckingham*, 33 Conn. 237; *Stewart v. Terre Haute & I. R. Co.*, 103 Ind. 44, 2 N. E. 208.

⁹⁷ *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 125, 19 N. W. 656;

tatives cannot sue when the beneficiaries are the statutory plaintiffs.⁹⁸

The time within which an action may be commenced is usually prescribed by the statute. In the absence of such special limitation, the period in which the action may be commenced is governed by the general provisions regulating the limitation of actions, so far as they may be applicable.⁹⁹

SAME—STATUTES OF LIMITATION.

91. Liability for torts is discharged or barred by the running of the statute of limitations.

92. The statute begins to run against a cause of action in tort—

(a) From the time the law presumes damage; or

(b) From the time of the happening of damage, when not presumed, except in case of fraud.

Both the cases to which a statute of limitations is applicable and the time it begins to run depend in a large measure upon the construction of the particular enactment under consideration. This will account for much, but not for all, of the confusion on the cases on this point. The statute of limitations of the forum governs, unless the statute giving the right of action prescribes the limitation.¹⁰⁰ But it is a general principle, of common application to

Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 411; *Weidner v. Rankin*, 26 Ohio St. 522.

⁹⁸ *Miller v. Southwestern Ry. Co.*, 55 Ga. 143; *Gibbs v. Hannibal*, 82 Mo. 143.

⁹⁹ *Schlichting v. Wintgen*, 25 Hun, 626. The time from which the statute of limitation begins to run is determined by the statute. It is sometimes the period at which it accrues,—that is, death. *Kennedy v. Burrier*, 36 Mo. 128; *Hanna v. Jeffersonville Ry.*, 32 Ind. 113. It sometimes commences to run upon the appointment of an administrator. *Andrews v. Hartford & N. H. R. Co.*, 34 Conn. 57; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. 579.

¹⁰⁰ *Munos v. Southern Pac. Co.*, 2 C. C. A. 163, 51 Fed. 188; *Williams v. St. Louis & S. F. Ry. Co.*, 123 Mo. 573, 27 S. W. 387; *Theroux v. Northern Pac. R. Co.*, 12 C. C. A. 52, 64 Fed. 84.

statutes of limitations as to contracts and torts, that the bar commences when the cause of action accrues.¹⁰¹ Accordingly, in the case of a single trespass to land, inasmuch as the law presumes damages the moment the close of another is broken, the running of the statute commences then.¹⁰² In conversion, the statute runs from the time of the conversion, whenever that may be.¹⁰³ Where a demand is necessary to constitute a conversion, the statute runs from the time of demand.¹⁰⁴ In the case of any other improper interference with property, prescription runs against an action for damage from the time of trespass. On the same principle, the statute of limitations begins to run against an action for damages by a father for the seduction of his minor daughter from the time of the seduction, that being the cause of action; subsequent results not giving a new cause of action, but only affecting the damages.¹⁰⁵ In many actions on quasi tort, the cause of action arises, and the statute commences to run, upon the breach of the contract.¹⁰⁶

If, however, the cause of action cannot, under any circumstances, rest on the doing of the thing alone, but depends also, necessarily, upon the resulting damage, then the statute commences to run, not from the time of the wrongful conduct, but of the occurrence of the harm.¹⁰⁷ Thus, where one owned houses built upon land contigu-

¹⁰¹ Wood, Lim. § 117; *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100; *New Holland Turnpike Co. v. Farmers' Ins. Co.*, 144 Pa. St. 541, 22 Atl. 923.

¹⁰² *Herreshoff v. Tripp*, 15 R. I. 92, 23 Atl. 104; *Hunter v. Burlington, C. R. & N. R. Co.*, 84 Iowa, 605, 51 N. W. 64.

¹⁰³ *Kelsey v. Griswold*, 6 Barb. (N. Y.) 436; *Haire v. Miller*, 49 Kan. 270, 30 Pac. 482; *Shuffler v. Turner*, 111 N. C. 297, 16 S. E. 417; *Davenport v. Prince*, 56 Fed. 186; *Gregory v. Fichtner* (Com. Pl.) 14 N. Y. Supp. 891; *Wood v. Young*, 141 N. Y. 211, 36 N. E. 193. Cf. *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448.

¹⁰⁴ *Haire v. Miller*, 49 Kan. 270, 30 Pac. 482.

¹⁰⁵ *Dunlap v. Linton*, 144 Pa. St. 335, 22 Atl. 819.

¹⁰⁶ *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545; *Russell & Co. v. Polk County Abstract Co.*, 87 Iowa, 233, 54 N. W. 212. And see *Fadden v. Satterlee*, 43 Fed. 568 (malpractice). So, in actions against common carrier, it has been held that the cause of action commences at the time of negligent conduct, not of damage. *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545; *Pennsylvania Co. v. Chicago, M. & St. P. R. Co.*, 144 Ill. 197, 33 N. E. 415; *Id.*, 44 Ill. App. 132.

¹⁰⁷ *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125, reviewing cases.

ous to the land of other persons, and the owner of the mines under the land of all these persons so worked the mines that the land of one of such other persons sunk, and, after more than six years (the period of limitation in actions on the case), their sinking caused an injury to the plaintiff's houses, it was held that his right of action was not barred, as the tort to him was the damage caused by the working of the mines, and not the working itself.¹⁰⁸ So, in ordinary actions for negligence, the cause of action and the running of the statute date from damage, not from the conduct.¹⁰⁹

In cases of actual fraud, the usual rule is that the statute of limitations against judicial action commences to run at the time of the discovery of the wrong, or at the time when the injured party was, by circumstances, sufficiently put upon such inquiry that he could and should have discovered the wrong, but not from the time of the wrong, or of the harm suffered.¹¹⁰ But the statute begins to run against an action to recover money obtained by a constructive fraud from the date of act committed.¹¹¹

SAME—COMPLIANCE WITH STATUTORY REQUIREMENTS.

93. Compliance with statutory requirements may constitute a full discharge of a tort.

As has been considered, no action lies for damages incident to authorized act. On the same principle, if an alleged wrongdoer has complied with specific requirements of law as to the conduct resulting in damage complained of, no action lies. The cases in which such matters arise are almost always in connection with specific wrongs; so that they must be dismissed here with mere reference. An illustration of a limitation before damage is to be

¹⁰⁸ *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765.

¹⁰⁹ *Board of Com'rs of Wabash Co. v. Pearson*, 120 Ind. 426, 22 N. E. 134.

¹¹⁰ *St. Paul, S. & T. F. R. Co. v. Sage*, 4 U. S. App. 160, 1 C. C. A. 256, 49 Fed. 315; *Lincoln v. Judd*, 49 N. J. Eq. 387, 24 Atl. 318; *Jacobs v. Frederick*, 81 Wis. 254, 51 N. W. 320; *Horbach v. Marsh*, 37 Neb. 22, 55 N. W. 286; *Northrop v. Hill*, 57 N. Y. 351; *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42; *Morgan v. Tener*, 83 Pa. St. 305; *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. 277.

¹¹¹ *Davis v. Hawkins*, 163 Pa. St. 228, 20 Atl. 746.

found in the multitude of enactments that an innkeeper is not liable for the loss of his guests' valuables, not delivered to him, if he has provided a safe and suitable place in the office for their keeping, and has posted notice so advising the guests. An illustration of discharge after damage occurs is the common legislative provision that a newspaper which has published a libel may rid itself of at least a portion of its responsibility by publishing a retraction.¹¹²

DISCHARGE OF JOINT TORTS—JUDGMENT.

94. THE ENGLISH RULE is that a judgment recovered in an action brought against one of several joint tort feors is a bar to an action against the others, although the judgment is not satisfied.

95. THE AMERICAN RULE is that the injured party who has elected to sue joint tort feors separately may prosecute the same until the amount of damages is ascertained by verdict and entered in judgment; that a judgment against one joint tort feor is no bar to a suit against another for the same wrong; but that the injured party can have only one satisfaction. Such party, however, may take his election *de melioribus damnis*, which, when made, is conclusive as to all subsequent proceedings. While the satisfaction of one judgment is the satisfaction of the cause of action, the plaintiff may collect costs in other judgments.

The English Rule.

The English rule, as stated in the black-letter text, was laid down in *Brown v. Wootton*.¹¹³ It is said that the earlier English doctrine was the other way.¹¹⁴ The rule as stated, however, is undoubtedly in force at the present time. The reason for this rule is that the damages are reduced to a certainty, that the cause of ac-

¹¹² Post, p. 307, "Libel and Slander"; "Statutory Defenses."

¹¹³ Cro. Jac. 73; Term 3, Jac. I.

¹¹⁴ 2 Kent, Comm. 388.

tion is changed into a matter of record, which is of a higher nature, and the inferior is merged in the higher. Although there are several defendants, there is only one cause of action. "The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit; and the cause of action, being single, cannot afterwards be divided."¹¹⁵

The American Rule.

In 1806, Chief Justice Kent¹¹⁶ disapproved *Brown v. Wootton*. The courts of Virginia, without much consideration, have held to the English doctrine.¹¹⁷ Rhode Island also holds to the same rule.¹¹⁸ The general American doctrine, however, is as stated in the black-letter text.¹¹⁹ The supreme court of the United States has accepted it fully. In *Lovejoy v. Murray*,¹²⁰ Mr. Justice Miller reviews the English and American cases in answer to this question: "Did the plaintiff, by suing the sheriff alone, recovering judgment for about \$6,000, and receiving from him \$830 on said judgment, thereby preclude himself from maintaining a suit against the defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case, a bar to this action?" The conclusion was reached that nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. A partial satisfaction by one of the wrongdoers for damages occasioned by the joint wrongful act of both is, however, properly received in evidence to mitigate damages. While the plaintiff can have

¹¹⁵ *King v. Hoare*, 13 Mees. & W. 494; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; *Buckland v. Johnson*, 15 C. B. 145. *Clifford, J.*, in *Sessions v. Johnson*, 95 U. S. 347-351.

¹¹⁶ *Livingston v. Bishop*, 1 Johns. 290.

¹¹⁷ *Wilkes v. Jackson*, 2 Hen. & M. (Va.) 355.

¹¹⁸ *Hunt v. Bates*, 7 R. I. 217.

¹¹⁹ *Cooley*, Torts, 138; *Livingston v. Bishop*, 1 Johns. 290; *Elliot v. Porter*, 5 Dana (Ky.) 299; *Thomas v. Rumsey*, 6 Johns. 26; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Woods v. Pangburn*, 75 N. Y. 495; *Elliott v. Hayden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 458; *Stone v. Dickinson*, 5 Allen (Mass.) 29; *Union Railway & Transit Co. v. Shacklett*, 19 Ill. App. 145; *Boardman v. Acer*, 13 Mich. 77. Compare *Brady v. Whitney*, 24 Mich. 154; *Kenyon v. Woodruff*, 33 Mich. 310. See *Blann v. Crocheron*, 20 Ala. 320.

¹²⁰ *Lovejoy v. Murray*, 3 Wall. 1; *Knapp v. Roche*, 94 N. Y. 329. And see *Thompson v. Halbert*, 109 N. Y. 329, 16 N. E. 675.

only one satisfaction, the satisfaction of the judgment must be the one which he has elected to take. In *Knickerbacker v. Colver*,¹²¹ it was distinctly held that, where there were two separate suits for the same trespass, the plaintiff may elect *de melioribus damnis*, but can have only one satisfaction. The plaintiff may make his election (e. g. to take the larger judgment or to pursue the solvent party); but, when he has made his election, he is concluded.¹²² Satisfaction of one judgment, however, will not preclude him from collecting his costs on other judgments; and he may take out execution for such costs.¹²³ The bringing of an action and the recovery of judgment against one of a number of wrongdoers, who are jointly and severally liable, is not an election of remedies as to the others, and does not sever their joint and several liability; but the wrongdoer who had been sued has a personal right to object to making him a party to the joint action.

Judgment does not Divest Property.

Under both English and American law, a judgment against one of several joint tortfeasors, without satisfaction, does not vest the property in the chattel in dispute, or bar a subsequent action against the other for continuing to detain it.¹²⁴ "It would be an absurdity," says Mr. Justice Willes,¹²⁵ "that the mere obtaining judgment, especially for nominal damages, could vest property, of which the plaintiff had been deprived, in defendant."

¹²¹ 8 Cow. 111.

¹²² *Power v. Baker*, 27 Fed. 396.

¹²³ *Windham v. Wither*, 1 Strange, 515; *Livingston v. Bishop*, 1 Johns. (N. Y.) 290-293; *First Nat. Bank v. Indianapolis Piano Manuf'g Co.*, 45 Ind. 5; *Ayer v. Ashmead*, 31 Conn. 447. See *Lord v. Tiffany*, 98 N. Y. 412. In a joint action for libel, several judgments were rendered. The smaller judgment was paid. Upon payment of costs, the other defendant was entitled to have the judgment against him satisfied. *Breslin v. Peck*, 38 Hun, 623.

¹²⁴ *Morris v. Robinson*, 5 Dowl. & R. 34-48, 3 Barn. & C. 196-206; *Ex parte Drake*, 5 Ch. Div. 866.

¹²⁵ *Brinsmead v. Harrison*, L. R. 6 C. P. 584-588.

SAME—RELEASE.

96. A release of one joint tort feisor does not release the others. But the injured person is entitled to only one satisfaction. If he receives that from one tort feisor, he cannot sue other joint tort feisors. Wherever the person injured by the wrong of several joint tort feisors has settled his claim for damages, and received satisfaction, from one of them, the cause of action is discharged as to all.

While separate suits, as has been seen,¹²⁶ may be brought against several defendants for a joint trespass, and while there may be recovery against each, there can be but one satisfaction. It is immaterial whether the satisfaction is obtained after judgment, or by amicable adjustment, without any litigation, of the claim for damages. The essential thing is the satisfaction.¹²⁷ A covenant not to sue one of two joint tort feisors does not operate as a release of the other from liability.¹²⁸

SAME—WAIVER.

97. In England, waiver of the tort as to one of several joint tort feisors, and suit against him in assumpsit, releases the other tort feisors.¹²⁹ In America, the rule is otherwise.

¹²⁶ *Livingston v. Bishop*, 1 Johns. 290.

¹²⁷ *Babcock & Wilcox Co. v. Pioneer Iron Works*, 34 Fed. 338; *Eastman v. Grant*, 34 Vt. 387; *Selther v. Philadelphia Traction Co.*, 125 Pa. St. 397, 17 Atl. 338; *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271. Cf. *Little Schuylkill, N. R. & C. Co. v. Richards' Adm'r*, 57 Pa. St. 142; *Gallagher v. Kemmerer*, 144 Pa. St. 509, 22 Atl. 970. A covenant not to sue, though for a valuable consideration, does not release the other joint tort feisor. *City of Chicago v. Babcock*, *supra*; *Whittemore v. Oil Co.*, 124 N. Y. 565, 27 N. E. 244.

¹²⁸ *Ellis v. Esson*, 50 Wis. 139, 6 N. W. 518; *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271.

¹²⁹ *Buckland v. Johnson*, 15 C. B. 145.

The English doctrine is consistent with the English rule as to the effect of a judgment against one of several tortfeasors upon a subsequent action against the others. The rule on this point being otherwise in America, it was properly said in *Huffman v. Hughlett*¹³⁰ (where an original action had been brought in assumpsit against one tortfeasor, and discontinued, and subsequently an action in conversion was brought against another tortfeasor): "If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but, as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for the conversion,' and a suing for the value of the property."¹³¹ It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrongdoer unimpaired, until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tortfeasors, even the last, on an implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one."

¹³⁰ *Huffman v. Hughlett*, 11 Lea (Tenn.) 549. Cf. *Floyd v. Brown*, 1 Rawle (Pa.) 121. *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, Mr. Keener points out, was decided by an unjustifiable use of the fiction in assumpsit. It has, however, been cited with approval. *Crossman v. Rubber Co.*, 127 N. Y. 34-37, 27 N. E. 400; *Roberge v. Winne*, 144 N. Y. 709-712, 39 N. E. 631. It was distinguished in *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498.

¹³¹ *Kirkman v. Phillips' Heirs*, 7 Heisk. 222-224.

CHAPTER V.

REMEDIES FOR TORTS—DAMAGES.

- 98. In General.
- 99. Extrajudicial Remedies.
- 100. Judicial Remedies.
- 101. Damages.
- 102–104. Nominal Damages.
- 105–116. Compensatory Damages.
- 117. Exemplary Damages.
- 118. Aggravation and Mitigation of Damages.
- 119–120. Excessive and Inadequate Damages.

IN GENERAL.

98. Remedies for torts may be divided into

- (a) Extrajudicial remedies, and
- (b) Judicial remedies.

EXTRAJUDICIAL REMEDIES.

99. Extrajudicial remedies for tort arise in cases where the law justifies self-help.

While it has always been insisted that it is contrary to best public policy to allow parties to take the law into their own hands, in certain well-marked cases the right of self-help has been recognized. Thus, there are circumstances under which one may, without doing wrong, abate a nuisance,¹ peaceably recapture his own goods,² re-enter on his own land,³ or exercise the right of defense of person or property,⁴ or of distraint.⁵ However, as civilization advances, necessity for and recourse to such remedies becomes less and less frequent.

¹ Post, p. 444, "Nuisance."

³ Post, p. 396, "Trespass."

² Post, p. 390.

⁴ Ante, p. 91, "Private Defense."

⁵ If a man find a chattel of another unlawfully on his land, and doing damage, he may seize and detain it, in order to compel the owner of the offending chattel to make compensation for the damage done. Clerk & L. Torts, 237.

JUDICIAL REMEDIES.

100. The law applies any remedy known to it, whenever such remedy is suitable. Judicial remedies for torts may be

(a) Extraordinary.⁶

(b) Ordinary.

The ordinary, and by far the most usual, remedy for torts is a civil action to recover a pecuniary indemnity from the wrongdoer,—that is, an action for damages. But sometimes the same state of facts that will support an action for damages will afford grounds for the application of other remedies. Thus, where a judgment for damages would be an inadequate remedy, a court of equity will award an injunction to restrain the commission or continuance of actionable wrongs. Injunction has been applied as a remedy for conspiracies by employés, such as strikes and boycotts.⁷ Equity will also sometimes appoint a receiver to preserve the subject of litigation, and prevent further wrong. Mandamus will lie to compel the performance of public official duties, although an action for damages would also be sustained; and personal property wrongfully detained may be specifically recovered in the action of replevin or claim and delivery. But, as has been said, the ordinary or normal remedy for torts is an action for damages.

Generally, as to distress damage feasant, see *Bunch v. Kennington*, 1 Q. B. 679 (hunting dog); *Hannam v. Mockett*, 2 Barn. & C. 934 (domestic pigeons); *Simpson v. Hartopp*, Willes, 515.

⁶ This classification is adopted for the sake of convenience, notwithstanding its variance from the conventional classification of extraordinary remedies. Attachment, replevin, detinue, and the like are not ordinary remedies for torts.

⁷ See *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310. Cf. *Blindell v. Hagan*, 54 Fed. 40; *Hagan v. Blindell*, 6 C. C. A. 86, 56 Fed. 696; *U. S. v. Debs*, 64 Fed. 724; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. See, generally, *Thomas v. Railroad Co.*, 62 Fed. 803; *Sisson, Crocker & Co. v. Johnson* (Cal.) 34 Pac. 617; *Cœur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. 260; *Reynolds v. Everett*, 67 Hun, 294, 22 N. Y. Supp. 306; *Id.*, 144 N. Y. 189, 36 N. E. 72; *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*, 9 Ch. App. 331.

SAME--DAMAGES.

101. Damages may be classified with reference to their amount as being either

- (a) Nominal, or**
- (b) Substantial.**

101a. Substantial damages may be again divided into

- (a) Compensatory damages, and**
- (b) Exemplary damages.**

102. NOMINAL DAMAGES—Nominal damages are damages insignificant in amount; a sum of money that can be spoken of, but has no existence in point of quantity.

103. Nominal damages are awarded only in cases where the law presumes damage. Whenever the law presumes damage, it presumes the lowest possible amount; that is, nominal damages.

104. Whenever damages must be proved to show the violation of a legal right, proof of nominal damage will not support an action. The law applies the maxim, "De minimis non curat lex."

It is a fundamental principle of the law of damages that, whenever one's rights have been invaded, he is entitled to compensation proportional to the amount of the injury.⁸ The extent of actual injury is usually a question of fact. In the absence of proof, the law can seldom say that a given wrong has resulted in damage of a definite amount. But, as has been seen, in many, and perhaps most, cases, proof of damage is essential to the proof of a legal wrong.¹⁰ In current phraseology, damages are the gist of the ac-

⁸ Sedg. Dam. 28; Suth. Dam. 18. "It is a rational and legal principle that the compensation should be equivalent to the injury." *Bussy v. Donaldson*, 4 Dall. 206. "It is a general and very sound rule of law that, where an injury has been sustained for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." *Rockwood v. Allen*, 7 Mass. 254.

¹⁰ *Ante*, p. 50.

tion. In this class of cases, the law awards the amount of damages that have been proved. But there is another class of cases, in which damages are not the gist, and need not be proved, because they are presumed by law. This occurs, as has been seen, wherever the conduct complained of is absolutely forbidden.¹¹ In this class of cases a wrong can be shown without proof of damage. If no damages in fact are or can be proved, the legal presumption nevertheless remains.¹² But the presumption is only that some damage has resulted; the law cannot presume a definite amount. "This requires some practical expression as the compensation for a technical injury. Therefore, nominal damages are given, as six cents, a penny, or a farthing,—a sum of money that can be spoken of, but has no existence in point of quantity. Verdicts and judgments for nominal damages generally specify a small sum which may be paid."¹³ It is only in cases where damages are not of the

¹¹ Ante, p. 57.

¹² *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; *Lafin v. Willard*, 16 Pick. 64; *Goodnow v. Willard*, 5 Metc. (Mass.) 517; *Lawrence v. Rice*, 12 Metc. (Mass.) 535. See, also, *Whittemore v. Cutter*, 1 Gall. 429, 433, Fed. Cas. No. 17,600; *Marsh v. Billings*, 7 Cush. 322; *Davis v. Kendall*, 2 R. I. 566. Cf. *Paul v. Slason*, 22 Vt. 231, *Mechem, Cas. Dam.* 8. Where an absolute right created by the prohibition of certain conduct is violated, damage is necessarily done, for the possessor of the right is deprived of something secured to him by law. Damage is presumed because it is inevitable that damage has resulted, though it cost the party nothing; "no, not so much as a little diachylon." All damage is not pecuniary. In *Ashby v. White*, *Ld. Raym.* 938, 958, where plaintiff had been deprived of a right to vote, Lord Holt, answering the objection that plaintiff had suffered no damage, said: "This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage but what is pecuniary, and a damage to property;" but "a damage is not merely pecuniary, but an injury imports a damage where a man is thereby hindered of his right." Piggott defined "damnum" as the violation of these absolute or specialized rights. *Pig. Torts*, 10. See, also, *Id.*, "Nominal Damages," 135.

¹³ *Suth. Dam.* 18. "Where the law implies the injury, it also implies the lowest damage." *Pastorius v. Fisher*, 1 Rawle, 27. And see *Repka v. Sergeant*, 7 Watts & S. 9. Where a party fails to furnish ore to a smelting company for a reduction at a fixed price, the company cannot recover more than nominal damages, where the quality of the ore was not fixed, unless they prove the profits of the smelting of whatever grade might be furnished. *Patrick v. Colorado Smelting Co.* (Colo. Sup.) 38 Pac. 236. See, also, *Fraser v. Echo Mining & Smelting Co.* (Tex. Civ. App.) 28 S. W. 714.

gist—that is, in cases of forbidden conduct—that nominal damages can be recovered;¹⁴ for it is only in this class of cases that a legal wrong can be shown without proof of actual damage. If substantial damage is shown, an equivalent amount is awarded, and the principle of nominal damages is not involved. The actual damage shown, however small, may be recovered.¹⁵ If there is in fact no damage,¹⁶ but rather a benefit,¹⁷ nominal damages are, nevertheless, allowed.

¹⁴ In *Brown v. Watson*, 47 Me. 161, it was held that for an injury to a private person, however inconsiderable, he may maintain an action. The plaintiff in that case had been compelled to take a circuitous route, because of obstructions placed in the road. He was allowed to recover.

¹⁵ Defendant may attempt “not to defeat the action altogether, but to restrict the amount of damages recovered to a nominal sum, by proving that the injury itself has not been substantial. The question involved in such cases is really one of compensation purely. If no substantial loss can be proved, the plaintiff must be restricted to nominal damages.” *Sedg. Dam.* 149; *Freese v. Crary*, 29 Ind. 524; *Carl v. Granger Coal Co.*, 69 Iowa, 519, 29 N. W. 437; *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. 177; *Bruce v. Pettengill*, 12 N. H. 341; *Hunt v. D’Orval*, Dud. (S. C.) 180; *Tully v. Fitchburg R. Co.*, 134 Mass. 500.

¹⁶ *Mellor v. Spateman*, 1 Saund. 346b; *Brant v. Gallup*, 111 Ill. 487; *Cook v. Hull*, 3 Pick. 269; *Bolivar Manuf’g Co. v. Neponset Manuf’g Co.*, 16 Pick. 241; *Stowell v. Lincoln*, 11 Gray, 434; *Pollard v. Porter*, 3 Gray, 312; *Pond v. Merrifield*, 12 Cush. 181; *Shattuck v. Adams*, 136 Mass. 34; *Newcomb v. Wallace*, 112 Mass. 25; *Marzetti v. Williams*, 1 Barn. & Adol. 412; *Warre v. Calvert*, 7 Adol. & E. 143; *Embrey v. Owen*, 6 Exch. 352; *Northam v. Hurley*, 1 El. & Bl. 663; *McConnel v. Kibbe*, 33 Ill. 175; *Burnap v. Wight*, 14 Ill. 301; *Dent v. Davison*, 52 Ill. 109; *Graver v. Sholl*, 42 Pa. St. 58; *Delaware & H. Canal Co. v. Torrey*, 33 Pa. St. 143; *Chamberlain v. Parker*, 45 N. Y. 509; *Dixon v. Clow*, 24 Wend. 188; *Quin v. Moore*, 15 N. Y. 432; *McIntyre v. New York Cent. R. Co.*, 43 Barb. 532; *Ihl v. Forty-Second St. & G. St. F. R. Co.*, 47 N. Y. 317; *Chapman v. Thames Manuf’g Co.*, 13 Conn. 268; *Eaton v. Lyman*, 30 Wis. 41; *Adams v. Robinson*, 65 Ala. 586; *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. 810; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Mize v. Glenn*, 38 Mo. App. 98; *Jones v. Hannovan*, 55 Mo. 462. “The action may be maintained to vindicate the rights.” Per Justice Story, in *Webb v. Portland Manuf’g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322. It is sometimes said that

¹⁷ *Hilbard v. W. U. Tel. Co.*, 33 Wis. 558; *Jewett v. Whitney*, 43 Me. 242; *Jones v. Hannovan*, 55 Mo. 462; *Murphy v. City of Fond du Lac*, 23 Wis. 365; *Stowell v. Lincoln*, 11 Gray, 434; *Gile v. Stevens*, 13 Gray, 146; *Francis v. Schoellkopf*, 53 N. Y. 152.

De Minimis non Curat Lex.

The oft-quoted, but little-understood, maxim, "De minimis non curat lex," does not prohibit the allowance of nominal damages.¹⁸

the violation of a right with a possibility of damage is sufficient to maintain an action. *Ross v. Thompson*, 78 Ind. 90; *Allaire v. Whitney*, 1 Hill, 484. See *Whitney v. Allaire*, 4 Denio, 554. But this is meaningless. If the right violated is an absolute one, damage need not be proved. If it is the fundamental right not to be harmed, damage must be proved in order to show a violation of the right. In *Allaire v. Whitney*, 1 Hill, 484, it was held to be actionable per se to draw one into a contract by fraud. The court said: "Indeed, in all such cases it would not be difficult to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, or one comparatively vain; and time is money. Fraud is odious to the law; and fraud in a contract can hardly be conceived of without being attended with damage in fact." Refusal by banker to pay check. *Marzetti v. Williams*, 1 Barn. & Adol. 415; *Winterbottom v. Wright*, 10 Mees. & W. 107. See, also, *Rolin v. Steward*, 14 C. B. 595, where actual damages were given. The omission of an administrator to settle his accounts with the probate court renders him liable for nominal damages at all events. *Webb v. Gross*, 79 Me. 224, 9 Atl. 612; *Fay v. Haven*, 3 Metc. (Mass.) 109; *McKim v. Bartlett*, 129 Mass. 226; *Probate Court v. Slason*, 23 Vt. 306. Contra, *Olmstead v. Brush*, 27 Conn. 530. A riparian owner may recover nominal damages for a bare infringement of his rights. *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South. 78; *Lund v. City of New Bedford*, 121 Mass. 286; *Tillotson v. Smith*, 32 N. H. 90; *Shannon v. Burr*, 1 Hill. 39; *Champion v. Vincent*, 20 Tex. 811. But see *Cory v. Silcox*, 6 Ind. 39; *McElroy v. Goble*, 6 Ohio St. 187; *Wood v. Waud*, 3 Exch. 748. Nominal damages may be recovered for the unlawful flowage of lands, *Chapman v. Copeland*, 55 Miss. 476; *Gerrish v. New Market Manuf'g Co.*, 30 N. H. 478; *Amoskeag Manuf'g Co. v. Goodale*, 46 N. H. 53; or for false imprisonment, *Deyo v. Van Valkenburgh*, 5 Hill, 242. In England it is held that, in an action against a public officer for neglect of duty, the

¹⁸ *Fullam v. Stearns*, 30 Vt. 443. "This maxim is never applied to the positive and wrongful (i. e. forbidden) invasion of another's property. To warrant an action in such a case, says a learned writer, 'some temporal damage, be it more or less, must actually have resulted, or must be likely to ensue. The degree is wholly immaterial; nor does the law upon every occasion require distinct proof that an inconvenience has been sustained. For example, if the hand of A. touch the person of B., who shall declare that pain has not ensued? The only mode to render B. secure is to infer that an inconvenience has actually resulted.'" *Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill, 170, 175. See *Wartman v. Swindell* (N. J. Err. & App.) 25 Atl. 356.

Keeping clearly in mind the fundamental idea that all legal rights are rights to immunity from harm, the proper application of the maxim is easily understood. The law is a practical science, adapted to the needs and conditions of every-day life. It does not attempt to insure men against all harm. Trifling vexations and losses incident to existence in a social state must be borne. The law will not countenance litigation over what is insignificant, for mere purposes of vexation. But nominal damages are given only in cases where the defendant has been guilty of forbidden conduct, or, in other words, when an absolute right has been violated. What the law has considered important enough to forbid cannot be regarded as a trifle. To require proof of substantial damages would in many cases nullify the prohibition, and destroy the right, by taking away the remedy for its violation. The maxim has no application to this class of cases, and it is only in this class of cases that nominal damages are ever awarded. Where, however, damages are not presumed, but must be proved,—that is, where the right directly involved is the fundamental right of immunity from harm, and not a specialized or absolute right correlative to a prohibition,—proof of merely nominal damages will not support an action. Here alone is the maxim, “*De minimis non curat lex*,” properly applied to take away a right of action. The law no longer distinguishes between no appreciable damage and no damage at all.¹⁹

plaintiff must show damage. The right which every man has to the services of such officer is relative to the benefit to be derived therefrom. The right and benefit are co-extensive; and, if the benefit is negatived, the right ceases. Wood, Mayne, Dam. 11; Pig. Torts, 129; Wylie v. Birch, 4 Q. B. 566; Williams v. Mostyn, 4 Mees. & W. 145; Stimson v. Farnham, L. R. 7 Q. B. 175; Hobson v. Thellusson, L. R. 2 Q. B. 642. In America it is generally held that the officer is liable without proof of damage. “The plaintiff is entitled to nominal damages for the officer’s neglect. * * * No actual damages are proved, but, where there is neglect of duty, the law presumes damage.” Laffin v. Willard, 16 Pick. 64. See, also, Goodnow v. Willard, 5 Metc. (Mass.) 517; Lawrence v. Rice, 12 Metc. (Mass.) 535; Mickles v. Hart, 1 Denio, 548; Patterson v. Westervelt, 17 Wend. 543; Palmer v. Gallup, 16 Conn. 555; Crawford v. Andrews, 6 Ga. 244.

¹⁹ St. Helen’s Smelting Co. v. Tipping, 11 H. L. Cas. 642; Smith v. Thackerah, L. R. 1 C. P. 564.

Nominal Damages Establish Rights.

The principal purpose of allowing nominal damages is the establishment of rights. As has been seen, a denial of nominal damages in all cases when no actual damages can be proved would often be a denial of those specialized or absolute rights which grow out of forbidden conduct. A fortiori, an action must lie "whenever the act done is of such a nature as that, by its repetition or continuance, it may become the foundation or evidence of an adverse right."²⁰ A judgment for the smallest conceivable sum is as effective for declaring the existence or nonexistence of a right as any sum, however large.²¹ Illustrations of actions brought to establish rights in which nominal damages were awarded might be multiplied indefinitely.²² A few will suffice. In the *Tunbridge Wells Dipper's Case*²³ the defendant had dipped bathers without having been chosen for the post by the homage according to statute. It was not proved that she had received any gratuity, but the plaintiffs were held entitled to nominal damages, in order to prevent the possibility of damage. In *Patrick v. Greenway*²⁴ the defendant fished in the plaintiff's several fisheries, but caught nothing. Plaintiff was nevertheless held entitled to a verdict because of the infringe-

²⁰ *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322. "Generally, when one encroaches upon the inheritance of another, the law gives a right of action; and, even if no actual damages are found, the action will be sustained, and nominal damages recovered, because, unless that could be done, the encroachments acquiesced in might ripen into legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title." *Hathorne v. Stinson*, 12 Me. 183. See, also, *Seldensparger v. Spear*, 17 Me. 123; *Chapman v. Thames Manuf'g Co.*, 13 Conn. 269.

²¹ *Patrick v. Greenaway*, 1 Saund. 346b, note; *Devendorf v. Wert*, 42 Barb. 227; *Bassett v. Salisbury Manuf'g Co.*, 8 Fost. (N. H.) 438; *Thomas v. Brackney*, 17 Barb. 654; *Carhart v. Auburn Gas Light Co.*, 22 Barb. 297; *Honsee v. Hammond*, 39 Barb. 89; *O'Riley v. McChesney*, 3 Lans. 278; *Delaware & H. Canal Co. v. Torrey*, 33 Pa. St. 143. No action lies for the diversion of a part of a stream by an upper proprietor, in the absence of actual, perceptible damage. *Elliot v. Railroad Co.*, 10 Cush. 191.

²² "To state when rights are infringed, and consequently when nominal damages are recoverable, would be to recapitulate the whole corpus juris." Sedg. Dam. 137.

²³ 2 Wils. 414.

²⁴ Cited in note to *Mellor v. Spateman*, 1 Saund. 346b.

ment of the right, which could thereafter be used as evidence of the exercise of the right by defendant. In *Bower v. Hill*²⁵ the plaintiff's right of way on a stream was obstructed, but the damage was problematical on account of the state of the stream. Plaintiff was held entitled to nominal damages, because acquiescence in the obstruction would be evidence of a renunciation of the right of way. In *Blofeld v. Payne*²⁶ the defendant imitated the plaintiff's bones, and the envelopes in which they were sold, thereby infringing his right. Plaintiff was allowed to recover, although no loss of custom was shown. In all these cases the conduct of defendant was expressly forbidden. A denial of nominal damages would have been a denial of the right for the purpose of creating which the conduct was forbidden.

105. COMPENSATORY DAMAGES—Compensatory damages are damages sufficient in amount, in contemplation of law, to indemnify the person injured for the loss suffered.

Compensatory damages are either nominal or substantial. Nominal damages are legal compensation for a technical wrong, where no substantial damages are proved. Where damages are thus presumed, they may not strictly be called "compensatory," for they may be awarded though the injury results in a benefit. But they may be strictly coincident with the harm suffered.²⁷ Accordingly, they sometimes are, and sometimes are not, strictly compensatory.²⁸ For convenience, in this discussion, the term "compensatory damages" will be limited to substantial compensation.

The cardinal principle governing the award of damages both in cases of torts and breaches of contract is that plaintiff should receive a just compensation for the loss suffered. "The general rule is that whoever does an injury to another is liable in damages to the extent of that injury."²⁹ Compensation, not restitution, is the proper test.

²⁵ 1 Bing. N. C. 549.

²⁷ Ante, p. 201.

²⁶ 4 Barn. & Adol. 410.

²⁸ Jag. Torts, 367.

²⁹ *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867. "It is a rational and a legal principle that the compensation should be equivalent to the injury." *Bussy v. Donaldson*, 4 Dall. 206. "It is a general and very sound rule of law that when an injury has been sustained, for which the law gives a rem-

But legal compensation often falls far short of actual indemnity.³⁰ The law does not and cannot give compensation for all the consequences of a wrongful act, nor can damages be recovered for mere inconvenience, vexation, or disappointment.³¹ The law prescribes what elements shall be considered in estimating legal compensation. Where the loss can be calculated by arithmetical rule and pecuniary standards, the amount of compensation is a question of law. Where the loss cannot be so estimated, as in cases of personal torts, the law merely prescribes what elements of injury shall be considered, and leaves the amount of compensation to the discretion of a jury.

edy, that remedy shall be commensurate to the injury sustained." *Rockwood v. Allen*, 7 Mass. 254. "By the general system of our law, for every invasion of right there is a remedy, and that remedy is compensation. This compensation is furnished in the damages which are awarded." Sedg. Dam. 28.

³⁰ "It has been contended that the true measure of damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for nonpayment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment." Tilghman, C. J., in *Bender v. Fromberger*, 4 Dall. 436, 444. "Every defendant against whom an action is brought experiences some injury or inconvenience beyond what the costs will compensate him for." Broom, Leg. Max. 199. "But, although the law does not attempt the impossibility of replacing the plaintiff in exactly the position he was in before the injury, yet, within the bounds of possibility, its aim is compensation." Sedg. Dam, 50.

³¹ *Hamlin v. Great Northern Ry. Co.*, 1 Hurl. & N. 408; *Hunt v. D'Orval*, Dud. (S. C.) 180. See *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052. "The injury must be physical, as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance, through the medium of the senses, not from delicacy of taste or a refined fancy." Bird, V. C., in *Westcott v. Middleton*, 43 N. J. Eq. 478, 486, 11 Atl. 490; *Id.*, 44 N. J. Eq. 297, 18 Atl. 80. Damages may be recovered for inconvenience amounting to physical discomfort. *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Southern Kan. Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817; *Emery v. City of Lowell*, 109 Mass. 197; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695; *Luse v. Jones*, 39 N. J. Law, 707; *Ives v. Humphreys*, 1 E. D. Smith, 196; *Scott Tp. v. Montgomery*, 95 Pa. St. 444.

106. For purposes of liability, the consequences of wrongful conduct may be divided into

- (a) Proximate consequences, and**
- (b) Remote consequences.**

107. Compensation may be recovered only for proximate losses resulting from wrongful conduct, and never for any losses which are remote.

Where compensation is claimed for losses alleged to have been caused by the wrongful conduct of another, the first question is whether the conduct complained of was really the cause of the harm in a sense upon which the law can act. The harm may be traceable to the conduct, but the connection may be, in the accustomed phrase, too remote. "*In jure non remota causa sed proxima spectatur.*" As has been seen, liability must be founded on conduct which is the proximate cause of the harm. Again, there may have been an undoubted wrong, but it may be doubtful how much of the harm is related to the wrongful conduct as its proximate consequence, and therefore is to be counted in estimating the wrongdoer's liability. The distinction of proximate from remote consequences is necessary—First, to ascertain whether there is any liability at all; and, second, if a wrong is established for which the defendant is liable, to fix the limit of liability or measure of damages.³² "Much the same considerations are involved whether the attempt is to show that the injury itself is remote from the act or only certain consequences of the injury. These classes of cases are often difficult to distinguish in practice; and both are to some extent involved in the consideration of nominal damages, where they shade into one another. Besides this, a case turning on the right of action may frequently be a precedent for the decision of a case involving the measure of damages."³³

It has been said that the term "proximate cause" is not capable of perfect or general definition,³⁴ and the confusion and uncertainty in the authorities justify the remark. The maxim, "*Non remota causa sed proxima causa spectatur,*" merely points out that some

³² Pol. Torts, 27.

³³ Sedg. Dam. 163.

³⁴ Pol. Torts, 28.

consequences are held too remote to be counted. The test of remoteness is still to be found.³⁵

108. For the purpose of determining what consequences are proximate and what remote, the losses caused by a wrong may be divided into

- (a) Direct, and
- (b) Consequential losses.

109. Direct losses are such losses as proceed immediately from wrongful conduct, without the intervention of any intermediate cause.³⁶

110. Direct losses are necessarily proximate, and compensation therefor is always recoverable.

Direct Losses.

A tortfeasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been foreseen by him.³⁷ The justice and propriety of this rule are mani-

³⁵ "The question as to what is the direct or proximate cause of an injury is ordinarily not one of science or legal knowledge, but of fact, for a jury to determine in view of the accompanying circumstances." *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. 559. The test of the most conspicuous antecedent, suggested by John Stuart Mill, has been recognized. "The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rarely, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily, that condition is usually termed the cause whose share in the matter is most conspicuous, and is the most immediately preceding and proximate in the event." Appleton, C. J., in *Moulton v. Inhabitants of Sanford*, 51 Me. 127, 134. See, also, *Dole v. Insurance Co.*, 2 Cliff. 431, Fed. Cas. No. 3,966; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Northwest Transp. Co. v. Boston Marine Ins. Co.*, 41 Fed. 802; *Sutton v. Town of Wauwatosa*, 29 Wis. 21. But see *Jeffersonville, M. & L. R. Co. v. Riley*, 39 Ind. 568; *Gates v. Railroad Co.*, 39 Iowa, 45.

³⁶ *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. 559.

³⁷ *Cogdell v. Yett*, 1 Cold. 230; *Tally v. Ayres*, 3 Sneed, 677; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21, Fed. Cas. No. 1,713; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Lane v. Atlantic Works*, 111 Mass. 136; *Blake v. Lord*, 16 Gray, 387; *Sloan v. Edwards*, 61 Md. 89; *Eten v. Luyster*, 60 N. Y. 252;

fest. If one man strike another with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual can make no difference. If the wrongdoer should in fact intend but slight injury, and deal a blow which in 99 cases out of 100 would result in a trifling injury, and yet, by accident, produced a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrongdoer from the consequences of his act. The real question in these cases is, did the wrongful conduct produce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the conduct is unlawful renders him liable for all its direct evil consequences.³⁸ Direct consequences are necessarily proximate. One is conclusively presumed to intend the direct consequences of one's acts. Thus, it was held in a civil action for assault, where defendant had intentionally kicked plaintiff on the leg during school hours, though he did not intend to injure him, that, the act being unlawful, defendant was liable for the injury which in fact resulted, though it could not have been foreseen.³⁹ So, also, a sleeping-car company is liable for a miscarriage caused by the wrongful expulsion of a married woman from a berth, though its servants were ignorant of her delicate condition.⁴⁰ And generally, where the previous physical condition is such as to increase the loss caused by a personal injury, the wrongdoer, though unaware of such condition, is, nevertheless, lia-

Lathers v. Wyman, 76 Wis. 616, 45 N. W. 669; *Newsom v. Newsom*, 1 Leigh, 86; *Keenan v. Cavanaugh*, 44 Vt. 268; *Little v. Boston & M. R. R.*, 68 Me. 239; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356; *Lowenstein v. Chappell*, 30 Barb. 241; *Horner v. Wood*, 16 Barb. 389; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. 559.

³⁸ *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356.

³⁹ *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403.

⁴⁰ *Mann Boudoir-Car Co. v. Dupre*, 4 C. C. A. 540, 54 Fed. 646. *Contra*, *Pullman Palace-Car Co. v. Barker*, 4 Colo. 344,—a case much criticised, and opposed to all the other authorities. See, also, *Campbell v. Pullman Palace-Car Co.*, 42 Fed. 484; *Barbee v. Reese*, 60 Miss. 906; *Oliver v. Town of La Valle*, 36 Wis. 594; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911.

ble for the whole loss caused, as such loss is the direct, though unexpected, consequence of the wrong.⁴¹

111. Consequential losses are the indirect losses caused by a wrong, but to which some intermediate cause has contributed.

112. Consequential losses may be either

- (a) Proximate, or
- (b) Remote.

113. Consequential losses are proximate when the natural and probable effect of the wrongful conduct under the circumstances is to set in operation the intervening cause from which the loss directly results. When such is not the natural and probable effect of the wrongful conduct, the losses are remote.

⁴¹ *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Lapleine v. Steamship Co.*, 40 La. Ann. 661, 4 South. 875; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 74, 7 Atl. 805; *Baltimore & L. T. Co. v. Cassell*, 66 Md. 419, 7 Atl. 805; *Elliott v. Van Buren*, 33 Mich. 49; *Jewell v. Grand Trunk Ry.*, 55 N. H. 84; *Stewart v. City of Ripon*, 38 Wis. 584; *Coleman v. New York & N. H. R. Co.*, 106 Mass. 160; *Allison v. Chicago & N. W. R. Co.*, 42 Iowa, 274; *Driess v. Friederick*, 73 Tex. 460, 11 S. W. 493; *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *Tice v. Munn*, 94 N. Y. 621; *Owens v. Kansas City, St. J. & C. B. R. Co.*, 95 Mo. 169, 8 S. W. 350; *Louisville & N. R. Co. v. Northington*, 91 Tenn. 56, 17 S. W. 880; *Jackson v. Railroad Co.*, 25 Am. & Eng. R. Cas. 327; *Louisville, N. A. & C. Ry. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70; *Wabash, St. L. & P. Ry. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356, 911; *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 15 N. W. 65; *McNamara v. Village of Clintonville*, 62 Wis. 207, 22 N. W. 472; *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340; *White Sewing-Mach. Co. v. Richter*, 2 Ind. App. 331, 28 N. E. 446; *Louisville, N. A. & C. Ry. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908, followed in *Ohio & M. R. Co. v. Hecht*, *supra*; *Vandenburgh v. Truax*, 4 Denio, 464. See, also, cases collected in *Clark v. Chambers*, 3 Q. B. Div. 327, 47 Law J. Q. B. 427; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 63 Fed. 942. "Where a disease caused by the injury supervenes, as well as where the disease exists at the time, and is aggravated by it, the plaintiff is entitled to full compensatory damages." The

Consequential Losses in General.

"A loss which is the immediate result of a wrong is called a 'direct loss'; one that is an indirect result of the wrong is called a 'consequential loss.'"⁴² For example, where a fence is destroyed, loss of the fence is the direct result. Loss of the crops by reason of trespassing cattle entering at the gap is indirect or consequential. Pain and bruises are the direct result of an assault and battery. The doctor's bill, loss of time, and the like, are consequential. Consequential losses differ from direct losses in this: that some intermediate cause has contributed to the injury. Whether or not compensation can be recovered for such losses will depend on the nature of the intervening cause. The damages recoverable for either a tort or a breach of contract must result without the intervention of any independent cause. In many of the cases the presence or absence of an "independent self-operating cause" is proposed as a test of what is proximate and what remote. But an intervening cause is not regarded as independent when the natural and probable effect of the conduct complained of is to set it in operation. Proximate consequences, therefore,

negligence causing the accident is the proximate cause of the injury. *Louisville, N. A. & C. Ry. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284.

⁴² Sedg. Dam. § 111. According to the supreme court of New Hampshire, the term "consequential damage" "means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately. In point of time, upon the doing of the act complained of. * * * It is thus used to signify damage which is recoverable at common law, in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of the act that the law affords no remedy to recover it. The terms 'remote damages' and 'consequential damages' are not necessarily synonymous, or to be indifferently used." *Eaton v. Railroad*, 51 N. H. 504, 519. And again: "A damage caused by a breach of a contract is often called consequential (in the technical sense of being a consequence so remote or unexpected as not to entitle the sufferer to redress) where it cannot reasonably be supposed to have been contemplated by the parties, in making the contract, as likely to be caused by the breach; and in tort a damage is often called consequential when it was not a reasonably necessary consequence, or one so natural and probable that the defendant can be reasonably supposed to have foreseen the likelihood of its having been caused by the wrong complained of." *Thompson v. Improvement Co.*, 54 N. H. 545.

are simply those that are natural and probable.⁴³ "Natural and probable" means what, according to common experience and the usual course of events, should be expected to happen. Every one is conclusively presumed to know and contemplate the natural and probable result of his acts.⁴⁴ The rule of natural and probable consequences is a vague one; but, as Sir Frederick Pollock has said,⁴⁵ if English law seems vague on these questions, it is because it is grappled more closely with the inherent vagueness of facts than any other system. In whatever form the rule is stated, it must be remembered that it is not a logical definition, but only a guide to the exercise of common sense. "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." The practical application of any rule is a matter of great difficulty. Different courts, though equally acknowledging the same principles, have sometimes reached diverse conclusions on similar states of facts. When the best possible rule is stated, each case must still be decided upon its own special state of facts, and often upon the nicest discriminations. "While in many cases the rule of damages is plain and easy of application, there are many others in which, from the nature of the subject-matter and the peculiar circumstances, it is very difficult, and in some cases impossible, to lay down any definite, fixed rule of law by which the damages actually sustained can be estimated with a reasonable degree of accuracy, or even a probable approximation to justice; and the

⁴³ Whether or not a given result is natural and probable is for the jury. *Haverly v. State Line & S. R. Co.*, 135 Pa. St. 50, 19 Atl. 1013. "Ordinarily, in cases of contract, the question is not one of liability for proximate cause, but of consequential damages. The breach of contract establishes liability, and the question of the allowance of any item of damage is practically one of interpretation of the contract, and consequently for the court." Sedg. El. Dam. 64, citing *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 111, 122; *Hammond v. Bussey*, 20 Q. B. Div. 79, 89. In an action of contract, Blackburn, J., said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote." *Hobbs v. London & S. W. R. Co.*, L. R. 10 Q. B. 111. See, also, *Hoag v. Railroad Co.*, 85 Pa. St. 293; *Wiley v. Railroad Co.*, 44 N. J. Law, 247.

⁴⁴ Suth. Dam. 32.

⁴⁵ Pol. Torts, 33.

injury must be left wholly or in great part unredressed, or the question must be left to the good sense of the jury upon all the facts and circumstances of the case, aided by such advice and instructions from the court as the peculiar facts and circumstances of the case may seem to require. But the strong inclination of the courts to administer legal redress upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted. We are compelled to say that the line of mere authority upon questions of damages like that here presented, if any such line can be traced through the conflict of hostile decisions, is too confused and tortuous to guide us to a safe or satisfactory result, without resort to the principles of natural justice and sound policy which underlie these questions, and which have sometimes been overlooked or obscured by artificial distinctions and arbitrary rules.”⁴⁶

The difficulty in stating and applying any practical rule has been much increased by the failure of courts to always use terms with precision and consistency. The distinction between proximate and remote consequences is often confounded with considerations of certainty and uncertainty of loss. Compensation for remote losses is refused, not because the loss is not in one sense caused by the wrong, but for reasons of public policy, and because the chain of causation cannot be followed with sufficient certainty. No cause can operate without being influenced by other causes. So, also, no cause is without an effect, which, in turn, becomes the cause of a further effect, and so on to infinity. Liability for consequences must end somewhere, and the law has fixed this limit at the natural and probable consequences. Compensation is recoverable for consequential losses only when they are proximate. Consequential losses are proximate only when they are natural and probable. Consequences are natural and probable only when, according to common experience and the usual course of events, the effect of the wrongful conduct was to set in operation the intermediate cause; that is to say, when the intermediate cause was

⁴⁶ Allison v. Chandler, 11 Mich. 542, Mech. Cas. Dam. 99.

not independent. It is just here that the difficulty lies. No effect is the product of a single isolated cause, but rather of innumerable co-existing causes. In one sense, every cause is the sum of all the antecedents, for no particular event could have happened if any one of innumerable necessary conditions had been absent. Mr. Wharton ⁴⁷ states the case of a haystack fired by a spark from a passing engine. If the railroad had not been built, an event depending on an almost infinite number of conditions (among them, the discovery of coal and iron), or if the haystack had not been erected, an event also dependent on innumerable conditions, no fire would have occurred. Each one of such conditions may therefore be regarded as a cause of the injury, for without it the fire could not have happened. In this view, every antecedent event is a cause of every subsequent one. It is obvious that the law cannot concern itself with such metaphysical refinements. When an efficient adequate cause of an injury is found, it must be taken as the true cause, unless some other independent cause is shown to have intervened between it and the injury.⁴⁸ The inquiry is always whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.⁴⁹ If there was, then such intermediate cause must be regarded as the proximate cause, and all antecedent causes as remote. The nature of the intervening cause is the all-important and decisive question. If it is independent of defendant's fault, and such that without it the injury would not have happened, the loss is remote, though defendant's act contributed to it.⁵⁰ In all cases, it is, of

⁴⁷ Whart. Neg. § 85.

⁴⁸ *Georgetown, B. & L. Ry. Co. v. Eagles*, 9 Colo. 545, 13 Pac. 606. See, also, *Blythe v. Denver & R. G. Ry. Co.*, 15 Colo. 333, 25 Pac. 702.

⁴⁹ *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469. If the injury received by the plaintiff through the negligence of the defendant superinduced and contributed to the production or development of a cancer, the defendant is responsible therefor, and the cancer is not to be treated as an independent cause of injury or suffering. The wrongdoer cannot be allowed to apportion the measure of his responsibility to the initial cause. *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 619.

⁵⁰ Where plaintiff was induced by false representations to put money in a speculation, and afterwards put in more money, the loss of the latter money was held a proximate consequence of the fraud. *Crater v. Blinniger*, 33 N.

course, prerequisite to any liability that defendant's act had an influence in causing the injury.⁵¹ There must be an immediate and

J. Law, 513. Injury to plaintiff's mill and machinery, caused by a boiler explosion, is a proximate consequence of defects in the boiler. *Page v. Ford*, 12 Ind. 46; *Erie City Iron Works v. Barber*, 106 Pa. St. 125. Where defendant abducted plaintiff's slaves, leaving no one to care for the plantation, it was held that compensation could be recovered for corn destroyed by cattle of the neighbors, and for wood swept away by a flood. *McAfee v. Crofford*, 13 How. 447. A loss through deprivation of means of protection is proximate. *Derry v. Flitner*, 118 Mass. 131; *The George and Richard*, L. R. 3 Adm. & Ecc. 466; *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 177. *Borradaile v. Brunton*, 8 Taunt. 535; 2 Moore, 582. But see *Hadley v. Baxendale*, 9 Exch. 341, 347. A defect in a fence is a proximate cause of a trespass by cattle and injury to crops. *Scott v. Kenton*, 81 Ill. 96. It is natural and probable that a trespassing horse will kick other horses on the premises. *Lee v. Riley*, 34 Law J. C. P. 212; *Lyons v. Merrick*, 105 Mass. 71. Where plaintiff's horses escaped through the defect, and were killed by the falling of a haystack on defendant's premises, the loss was held not too remote. *Powell v. Salisbury*, 2 Younge & J. 391. Where cattle escaped, and ate branches of a yew tree, and were thereby poisoned, the loss is the proximate result of the defect. *Lawrence v. Jenkins*, L. R. 8 Q. B. 274. Where defendant's wrong obliges plaintiff to raise money, a loss through a forced sale of property is too remote to be compensated. See *Deyo v. Waggoner*, 19 Johns. 241; *Donnell v. Jones*, 13 Ala. 490; *Cochrane*

⁵¹ *Royston v. Illinois Cent. R. Co.*, 67 Miss. 376, 7 South. 320; *Jackson v. Hall*, 84 N. C. 489; *Wulstein v. Mohlman* (Super. N. Y.) 5 N. Y. Supp. 569; *Ellis v. Cleveland*, 55 Vt. 358; *Huxley v. Berg*, 1 Starkie, 98; *Hampton v. Jones*, 58 Iowa, 317, 12 N. W. 276; *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. 22; *Lewis v. Flint & P. M. Ry.*, 54 Mich. 55, 19 N. W. 744 (cause and occasion. Opinion by Cooley, J., collecting and discussing cases). Where a 10 year old boy, while attempting to climb up a ladder attached to a box car of a moving train, lost his footing, and was thrown under the train and killed, his own negligence was the proximate cause of his death. There was no causal connection between the negligence of the company in running its train at a greater speed than allowed by ordinance, and the injury suffered. *Western Ry. of Alabama v. Mutch*, 97 Ala. 194, 11 South. 894. Money paid by a railroad company as damages and expenses of a suit brought against it for ejecting a passenger who refused to pay fare, except by presenting a coupon issued by a connecting line without authority, cannot be recovered from the latter; for the only remedy, as against it, was to refuse to recognize the coupon, and the subsequent ejection, particularly if accompanied by unnecessary force, was not made legally necessary by its act in selling the ticket, but was upon the sole responsibility of the company causing the same. *Pennsylvania R. Co. v. Wabash, St. L. & P. R. Co.*, 157 U. S. 225, 15 Sup. Ct. 576.

natural relation between the act complained of and the injury, without the intervention of other independent causes, or the damages will be too remote.⁵²

v. Quackenbush, 29 Minn. 376, 13 N. W. 154; *Larios v. Gurety*, L. R. 5 P. O. 346; *Travis v. Duffau*, 20 Tex. 49; *Smith v. O'Donnell*, 8 Lea, 468. Selling animals with an infectious disease is the proximate cause of its communication to other animals of the purchaser. *Wheeler v. Randall*, 48 Ill. 182; *Sherrod v. Langdon*, 21 Iowa, 518; *Joy v. Bitzer*, 77 Iowa, 73, 41 N. W. 575; *Broquet v. Tripp*, 36 Kan. 700, 14 Pac. 227; *Faris v. Lewis*, 2 B. Mon. 375; *Bradley v. Rea*, 14 Allen, 20; *Long v. Clapp*, 15 Neb. 417, 19 N. W. 467; *Jeffrey v. Blgelow*, 13 Wend. 518; *Wintz v. Morrison*, 17 Tex. 372; *Routh v. Caron*, 64 Tex. 289; *Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, 1 C. P. Div. 92. Loss of business caused by the deprivation of machinery or of business premises is usually considered proximate. *Waters v. Towers*, 8 Exch. 401; *New York & C. Mining Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665; *Jolly v. Single*, 16 Wis. 280; *Savannah, F. & W. Ry. Co. v. Pritchard*, 77 Ga. 412, 1 S. E. 261; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644; *Sitton v. MacDonald*, 25 S. C. 68; *New Haven Steam-Boat Co. v. Mayor, etc.*, 36 Fed. 716; *Moore v. Davis*, 49 N. H. 45; *Carlisle v. Callahan*, 78 Ga. 320, 2 S. E. 751; *Lange v. Wagner*, 52 Md. 310. But see *Vedder v. Hildreth*, 2 Wis. 427, and *Ruthven Woolen Manuf'g Co. v. Great Western R. Co.*, 18 U. C. C. P. 316. Loss of goods by sudden flood is not a proximate consequence of a negligent delay by a carrier. *Denny v. New York Cent. R. Co.*, 13 Gray, 481; *Morrison v. Davis*, 20 Pa. St. 171; *Railroad Co. v. Reeves*, 10 Wall. 176. Where a defect in the street causes a traveler to be thrown out of his carriage, and exposed to the cold and rain, the city is liable for a serious disease thereby contracted. *Ehrgott v. Mayor, etc.*, 96 N. Y. 264. In an action on a fire insurance policy, the judge, in his charge to the jury, stated the theory of plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them, called a 'short circuit'; that the short circuit resulted in keeping back, or in bringing into the dynamo below, an increase of electric current, that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed, and the succeeding pulleys, up to the jack pulley, were ruptured; that by reason of pieces flying from the jack pulley, or from some other cause, the fly wheel of the engine was destroyed, the governor broken, and everything crushed,—in a

⁵² *Rucker v. Athens Manuf'g Co.*, 54 Ga. 84. See *Bosch v. Railroad Co.*, 44 Iowa, 402.

Illustrations of Proximate and Remote Consequences.

Where defendant destroyed the lateral support of a house by wrongfully excavating in a public street, he is liable for injuries to an adjoining house depending on the other for support,⁵³ no independent cause having intervened. A gas company contracted to supply plaintiff with a service pipe, and laid a defective pipe, from which gas escaped. A plumber employed by plaintiff took a lighted candle to discover from whence the gas escaped, and an explosion took place. The negligence of the gas company in laying a defective pipe was held the proximate cause of the explosion.⁵⁴ Here the injury could not have happened but for the intervening negligence of the plumber, but the obvious tendency of the original fault was to set in operation just such a force, and therefore the loss could not be regarded as remote. Where a village maintains a sidewalk at an unsafe height without guards it is liable for injuries to one who is negligently pushed off by a third person;⁵⁵ but, where a town negligently leaves an excavation in a street, it is not liable to one who was willfully thrown into it by another.⁵⁶ The act of the latter was not a natural and probable effect of the act of the town. There was no causal connection between them. In *Sharp v. Powell*,⁵⁷ the defendant, contrary to a police regulation, had washed his wagon in the public street, allowing the water to run down the gutter, to a sewer which, under ordinary circumstances, would have carried it off. But the grating over the sewer was obstructed, and the water spread over the pavement, and froze, forming a sheet of ice. Plain-

word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt, through the action of electricity, and that caused the damage." It was held that the loss was a natural and proximate consequence of the fire, and recoverable. *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 23 N. E. 690.

⁵³ *Baltimore & P. R. Co. v. Reaney*, 42 Md. 118.

⁵⁴ *Burrows v. March Gas & Coke Co.*, 39 Law J. Exch. 33, L. R. 5 Exch. 67. See, also, *Lannen v. Albany Gaslight Co.*, 44 N. Y. 459; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432.

⁵⁵ *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14.

⁵⁶ *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N. E. 200.

⁵⁷ L. R. 7 C. P. 253, 41 Law J. C. P. 95. Cf. *Chamberlain v. City of Oshkosh*, 84 Wis. 289, 54 N. W. 618.

tiff's horse, being led by, slipped on the ice, and broke its leg. Defendant did not know that the grating was obstructed. It was held that defendant was not liable, the court saying that the loss was too remote, because not one which defendant could fairly be expected to anticipate as likely to ensue from his act. The formation of the sheet of ice at the sewer was not a natural and probable result of defendant's wrong. The obstruction of the grating was an unusual circumstance.

The shooting of plaintiff's decedent while making an attack on a neighbor's house when drunk is not a natural and probable consequence of the liquor dealer's unlawful conduct in selling to him while intoxicated,⁵⁸ for independent causes intervened. Where an injury to a traveler on a highway is caused partly by a defective road and partly by ice with which it is covered, the defect in the road is the proximate cause of the injury.⁵⁹ The duty of the city is not affected by the fact that the ice is in part the result of artificial causes, as of water escaping from a hose, and not wholly of natural causes, such as the fall of rain.⁶⁰

Where plaintiff could have avoided the injurious consequences of defendant's wrong, his negligence in failing to do so is regarded as the proximate cause of the damage, and the original fault is remote.⁶¹ A carrier set plaintiff down a mile from her destination. The day was cold, and there was a line of street cars which plaintiff might have used, but she walked home, and, in so doing, caught cold, and suffered permanent injuries. The injury was

⁵⁸ *Schmidt v. Mitchell*, 84 Ill. 195. And see *Bradford v. Boley* (Pa. Sup.) 31 Atl. 751.

⁵⁹ *City of Atchison v. King*, 9 Kan. 550; *City of Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41.

⁶⁰ *Henkes v. City of Minneapolis*, 42 Minn. 530, 44 N. W. 1026. As to highway accidents generally, see *Oliver v. Town of La Valle*, 36 Wis. 592; *Jackson v. Town of Bellevue*, 30 Wis. 250; *Kelley v. Town of Fond du Lac*, 31 Wis. 179; *Moulton v. Inhabitants of Sanford*, 51 Me. 127; *Cobb v. Inhabitants of Standish*, 14 Me. 198; *Marble v. City of Worcester*, 4 Gray, 395; *Palmer v. Inhabitants of Andover*, 2 Cush. 600; *Davis v. Inhabitants of Dudley*, 4 Allen, 557; *Smith v. Smith*, 2 Pick. 621; *Horton v. City of Taunton*, 97 Mass. 266, note; *Hyatt v. Trustees of Village of Rondout*, 44 Barb. 385; *Sykes v. Pawlet*, 43 Vt. 446; *Bovee v. Danville*, 53 Vt. 183.

⁶¹ See post, "Avoidable Consequences."

held too remote, plaintiff's negligence in failing to take the street car having intervened and caused the injury.⁶²

Where a human agency or the voluntary act of a person over whom defendant has no control intervenes after defendant's wrongful act, the consequences are usually remote.⁶³ But, where the act of the third party is a natural and probable result of defendant's acts, the loss is not too remote.⁶⁴ Loss of credit or custom involves the intervention of the will of strangers, and is therefore usually too remote.⁶⁵ But, where the wrongful conduct directly affects the credit or trade of plaintiff, the rule is otherwise.⁶⁶ A trespasser is liable for the injury caused by a crowd which he draws after him, if his act was of a nature to attract a destructive crowd.⁶⁷

⁶² *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7. See, also, *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 111; *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391. But see *Drake v. Kiely*, 93 Pa. St. 492.

⁶³ *Burton v. Pinkerton*, L. R. 2 Exch. 340; *Stone v. Codman*, 15 Pick. 297; *Schmidt v. Mitchell*, 84 Ill. 195; *Hampton v. Jones*, 58 Iowa, 317, 12 N. W. 276; *Ellis v. Cleveland*, 55 Vt. 358; *Mitchell v. Clarke*, 71 Cal. 163, 11 Pac. 882; *State v. Ward*, 9 Helsk. 100, 133; *Vicars v. Wilcocks*, 8 East, 1, 2 Smith, Lead. Cas. Eq. 553, and exhaustive note. Loss of a situation is not a proximate consequence of an assault and battery. *Brown v. Cummings*, 7 Allen, 507.

⁶⁴ *Griggs v. Fleckenstein*, 14 Minn. 81 (Gil. 62); *Billman v. Railroad Co.*, 76 Ind. 166; *McDonald v. Snelling*, 14 Allen, 292; *Lane v. Atlantic Works*, 111 Mass. 136.

⁶⁵ *Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. 406; *Weeks v. Prescott*, 53 Vt. 57; *Burnap v. Wight*, 14 Ill. 301. See *Alexander v. Jacoby*, 23 Ohio St. 358; *Dennis v. Stoughton*, 55 Vt. 371; *Pollock v. Gantt*, 69 Ala. 373. Contra, *MacVeagh v. Bailey*, 29 Ill. App. 606.

⁶⁶ *Boyd v. Flitt*, 14 Ir. C. L. 43; *Larios v. Gurety*, L. R. 5 P. C. 346; *Tarleton v. M'Gawley*, Peake, 270.

⁶⁷ *Fairbanks v. Kerr*, 70 Pa. St. 86; *Guille v. Swan*, 19 Johns. 381. Negligence causing fright to a pregnant woman is the proximate cause of a miscarriage. *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034. Negligent driving by defendant is the proximate cause of injuries received by one run over by the horses of a carriage with which defendant collided, causing them to run away. *McDonald v. Snelling*, 14 Allen, 290. In a country where high winds are not unusual, the rising of the wind causing a fire to spread does not render negligence in starting the fire a remote cause. *Poeppers v. Railway Co.*, 67 Mo. 715. See, also, as to spreading of fire, *Fent v. Railway Co.*, 59 Ill. 349. A railway collision, in which decedent was injured, is not the proximate cause of his suicide eight months later. *Scheffer v. Railroad Co.*, 105 U. S. 249.

Anticipation of Consequences.

Where, at the time a tort was committed, it might have been reasonably expected to set in operation the intermediate cause of an injury, or where it exposes plaintiff to the risk of injury from some fairly obvious danger, which ultimately results in injury, the loss is a natural and probable one, and may be compensated.⁶⁸ The rule that compensation for consequential injuries caused by torts cannot be recovered unless they are such as could have been reasonably anticipated does not require the injury to have been actually foreseen.⁶⁹ It is simply another way of stating the rule that damages, to be recoverable, must be natural and probable; and it is misleading. "The damages are not limited or affected, so far as they are compensatory, by what was, in fact, in contemplation by the party in fault."⁷⁰ If a tortfeasor expected the injury to result from his wrongful act, which in fact did result, he must be presumed to have intended to cause that particular injury; and the loss would be a direct rather than a consequential one, and compensation could be recovered on the principle already explained.⁷¹ That which a man actually foresees is to him, at all events, natural and probable.⁷² All that is required is that the injury be such as would probably result from such a tort under the circumstances.⁷³ Every person may reasonably be presumed

⁶⁸ Proximate damages are such as would be reasonably anticipated by a prudent man. *Poeppers v. Railway Co.*, 67 Mo. 715.

⁶⁹ *Suth. Dam.* § 28; *Bowas v. Tow Line*, 2 Sawy. 21, Fed. Cas. No. 1,713; *Bishop v. St. Paul City Ry. Co.*, 48 Minn. 26, 50 N. W. 927; *Clark v. Chambers*, 3 Q. B. Div. 327; *Lowery v. Railway Co.*, 99 N. Y. 158, 1 N. E. 608; *Hill v. Winsor*, 118 Mass. 251.

⁷⁰ *Suth. Dam.* § 16.

⁷¹ *Stevens v. Dudley*, 56 Vt. 158, 166.

⁷² *Pol. Torts*, 28.

⁷³ *Whart. Neg.* §§ 77, 78; *Suth. Dam.* § 16; *Higgins v. Dewey*, 107 Mass. 494; *White v. Ballou*, 8 Allen, 408; *Luce v. Insurance Co.*, 105 Mass. 297; *Stevens v. Dudley*, 56 Vt. 158; *Brown v. Railroad Co.*, 54 Wis. 342, 11 N. W. 356, 911; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Winkler v. Railroad Co.*, 21 Mo. App. 99; *Evans v. Railroad Co.*, 11 Mo. App. 463; *Baltimore City P. R. Co. v. Kemp*, 61 Md. 74; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 281; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Clark v. Chambers*, 3 Q. B. Div. 327. It is enough that

to know what the consequences of their acts will be according to common experience and the usual course of nature, and required to guard against them.⁷⁴ To that extent, therefore, a wrongdoer is liable to any person injured by his wrongful acts. But no person can be required to guard against the extraordinary or unusual consequences of an act; and, there being no duty to guard against them, such losses are *damnum absque injuria*.⁷⁵ The loss—the *damnum*—is there, but the *injuria* is wanting.

the damage is the natural, though not the necessary, result. *Miller v. St. Louis, I. M. & S. Ry. Co.*, 90 Mo. 389, 2 S. W. 439; *Baltimore City P. R. Co. v. Kemp*, 61 Md. 74. But see *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342, 11 N. W. 356, 911, and *Atkinson v. Transportation Co.*, 60 Wis. 141, 18 N. W. 764. See, also, *Scheffer v. Railroad Co.*, 105 U. S. 249; *Binford v. Johnston*, 82 Ind. 426; *Schmidt v. Mitchell*, 84 Ill. 195; *Eames v. Railroad Co.*, 63 Tex. 600; *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320; *The Notting Hill*, 9 Prob. Div. 105; *Childress v. Yourle*, Meigs (Tenn.) 561; *Forney v. Geldmacher*, 75 Mo. 113; *Schrader v. Crawford*, 94 Ill. 357.

⁷⁴ One who places another, whom he has made helplessly drunk, in charge of a horse, is presumed to have anticipated the injury which followed. *Dunlap v. Wagner*, 85 Ind. 529. See, also, *Mead v. Stratton*, 87 N. Y. 493; *Bertholf v. O'Reilly*, 8 Hun, 16; *Id.*, 74 N. Y. 509; *Aldrich v. Sager*, 9 Hun, 537; *Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. 598; *Brink v. Railroad Co.*, 17 Mo. App. 177, 199.

⁷⁵ A woman's illness, resulting from fright, is not the natural result of the shooting of a dog. *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435. Plaintiff was in bed, in her house. A quarrel between defendant and her husband so frightened her that she gave premature birth to a child. Defendant did not know of her proximity, nor of her condition. He was held not liable. *Phillips v. Dickerson*, 85 Ill. 11. See, also, *Rich v. Railroad Co.*, 87 N. Y. 382; *Allegheny v. Zimmerman*, 95 Pa. St. 287; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968; *Johnson v. Drummond*, 16 Ill. App. 641; *Nelson v. Railroad Co.*, 30 Minn. 74, 14 N. W. 360; *Royston v. Railroad Co.*, 67 Miss. 376, 7 South. 320; *Jackson v. Hall*, 84 N. C. 489; *Wulstein v. Mohlman* (Super. Ct.) 5 N. Y. Supp. 569; *Ellis v. Cleveland*, 55 Vt. 358; *Huxley v. Berg*, 1 Starkie, 98; *Hampton v. Jones*, 58 Iowa, 317, 12 N. W. 276; *Phyfe v. Railroad Co.*, 30 Hun, 377; *Teagarden v. Hetfield*, 11 Ind. 522; *Gamble v. Mullin*, 74 Iowa, 99, 36 N. W. 909. Damages for loss of prospective offspring cannot be recovered in an action for negligence resulting in a miscarriage. *Butler v. Railroad Co.*, 143 N. Y. 417, 38 N. E. 454.

114. All the damage resulting from a single cause of action must be recovered in a single action. The demand cannot be split, and separate actions maintained for the separate items of damage.

A single cause of action gives rise to but a single demand for damages. It is an entirety. Plaintiff must demand the full amount of damages to which he is entitled in one suit, and a judgment therein is a bar to any subsequent suit on the same cause of action, even though losses arise subsequently which could not have been foreseen or proved at the time of the former suit. The matters complained of have become *res judicata*. The cause of action cannot be split, and separate suits maintained for the recovery of each separate item of damage. A cause of action is the wrong complained of; that is, the conjunction of conduct and damage.⁷⁶ Neither alone constitutes a legal wrong. When an award of damages has been once made for a wrong, that wrong is redressed. Losses subsequently arising, without a renewal or continuance of the conduct, are *damnum absque injuria*.⁷⁷ On this principle, a recovery in an action for assault and battery was held to be a bar to a subsequent action for additional damages, brought upon the falling out of another piece of plaintiff's skull.⁷⁸ Holt, C. J., said: "Every new dropping is a nuisance, but it is not a new battery; and, in trespass, the grievousness or consequence of the battery is not the ground of the action, but the measure of damages which the jury must be supposed to have considered at the trial." And in another place he said: "If this matter had been given in evidence as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation of damages."

⁷⁶ See ante, p. 50 et seq.

⁷⁷ *Wichita & W. R. Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502; *Howell v. Goodrich*, 69 Ill. 556; *Pierro v. Railway Co.*, 39 Minn. 451, 40 N. W. 520; *Winslow v. Stokes*, 3 Jones (N. C.) 285.

⁷⁸ *Fetter v. Beal*, 1 Ld. Raym. 339, 692, 1 Salk. 11.

115. The damages recoverable in an action include compensation not only for losses already sustained at the time of beginning the action, but also for losses which have arisen subsequently, and for prospective losses, if such losses are the certain and proximate results of the cause of action, and do not themselves constitute a new cause of action.

Repetition of Wrong.

Where an action has been brought for a wrong, and the wrong is subsequently repeated, a new action must be brought to recover the damages caused thereby. Such repetition constitutes a new cause of action, and compensation for the losses caused by one wrong cannot be recovered in an action brought to recover the damages caused by another and a distinct wrong.⁷⁹

Continuing Torts and Breaches of Contract.

A single wrongful act, however, may be of such a nature as to give rise to a continuous succession of torts. "In the case of a personal injury the act complained of is complete and ended before the date of the writ. It is the damage only that continues and is recoverable, because it is traced back to the act; while in the case of a nuisance it is the act which continues, or, rather, is renewed day by day. The duty which rests upon a wrongdoer to remove a nuisance causes a new trespass for each day's neglect."⁸⁰ In this class of cases, therefore, successive actions may be maintained to recover compensation for the successive losses sustained, because each loss results from a separate cause of action.⁸¹ For the same reason, the damages in each case are limited to compensation for losses already sustained at the time of bringing the action. Damages for prospective losses cannot be recovered, for they constitute the basis of

⁷⁹ In an action for slander, evidence of words spoken after commencement of suit are inadmissible. *Root v. Lowndes*, 6 Hill, 518; *Keenholts v. Becker*, 3 Denio, 346.

⁸⁰ *Rockland Water Co. v. Tillson*, 69 Me. 255, 268. An excavation on one's own land is not a tort; but causing the subsidence of a neighbor's land by such excavation is a tort. Therefore successive actions may be maintained for successive subsidences. *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127.

⁸¹ *Rockland Water Co. v. Tillson*, 69 Me. 255, 268.

new actions. A continuing tort, in effect, is simply the repetition of the same wrong an infinite number of times.

Illustrations.

Illustrations of continuing torts are numerous. In an action for false imprisonment, damages cannot be given for a continuance of the imprisonment after the commencement of the action, for every instant of detention without just cause is an independent tort.⁸² So, also, a nuisance gives rise to a fresh cause of action every moment it is maintained; and therefore the damages recoverable are limited to those already suffered at the commencement of the suit.⁸³ The reason and necessity of permitting successive actions in this class of cases is very clear. It is one's duty to discontinue a trespass or remove a nuisance.⁸⁴ The law cannot presume that defendant will continue the wrong, nor will it permit him to acquire a right to continue it, by permitting a recovery therefor in advance.⁸⁵ Thus, where the wrong consists in the unlawful maintenance of a private structure, or an unlawful use of land, the wrong cannot be presumed to be permanent; and therefore prospective damages can-

⁸² *Brasfield v. Lee*, 1 *Ld. Raym.* 329; *Withers v. Henley*, *Cro. Jac.* 379.

⁸³ *Denver City Irrigation & Water Co. v. Mildaugh*, 12 *Colo.* 434, 21 *Pac.* 565; *Duncan v. Markley*, 1 *Harp.* 276; *Cobb v. Smith*, 38 *Wis.* 21; *Stadler v. Grieben*, 61 *Wis.* 500, 21 *N. W.* 629. See, also, *Pearson v. Carr*, 97 *N. C.* 194, 1 *S. E.* 916; *Dalley v. Canal Co.*, 2 *Ired.* 222. In an action for flowing land, damages can be recovered only for losses suffered prior to bringing suit. *Polly v. McCall*, 37 *Ala.* 20; *Benson v. Railroad Co.*, 78 *Mo.* 504; *Nashville v. Comar*, 88 *Tenn.* 415, 12 *S. W.* 1027; *Hargreaves v. Kimberly*, 26 *W. Va.* 787. So, also, in actions for diverting water courses, *Langford v. Owsley*, 2 *Bibb*, 215; *Dority v. Dunning*, 78 *Me.* 387, 6 *Atl.* 6; *Shaw v. Etheridge*, 3 *Jones (N. C.)* 300; or for polluting it, *Sanderson v. Coal Co.*, 102 *Pa. St.* 370.

⁸⁴ There is a legal obligation to discontinue a trespass or remove a nuisance. *Clegg v. Dearden*, 12 *Q. B.* 601; *Savannah, F. & W. R. Co. v. Davis*, 25 *Fla.* 917, 7 *South.* 29; *Adams v. Railroad Co.*, 18 *Minn.* 260 (*Gil.* 236); *Barrick v. Schifferdecker*, 48 *Hun.* 355, 1 *N. Y. Supp.* 21; *Cumberland & O. C. Corp. v. Hitchings*, 65 *Me.* 140.

⁸⁵ *Suth. Dam.* 255; *Adams v. Railroad Co.*, 18 *Minn.* 260 (*Gil.* 236); *Ford v. Railroad Co.*, 14 *Wis.* 663; *Uline v. Railroad Co.*, 101 *N. Y.* 98, 4 *N. E.* 536; *Savannah & O. C. Co. v. Bourquin*, 51 *Ga.* 378; *Hanover Water Co. v. Ashland Iron Co.*, 84 *Pa. St.* 279; *Whitmore v. Bischoff*, 5 *Hun.* 176; *Sherman v. Railroad Co.*, 40 *Wis.* 645; *Russell v. Brown*, 63 *Me.* 203; *Bowyer v. Cook*, 4 *C. B.* 236; *Cumberland & O. C. Corp. v. Hitchings*, 65 *Me.* 140.

not be recovered. This principle has been applied in actions for obstructing a stream,⁸⁶ for obstructing ancient lights,⁸⁷ for filling a canal,⁸⁸ and for laying out a highway around plaintiff's toll gate.⁸⁹

Where an injury to plaintiff's land consists of a trespass which defendant cannot remedy without committing another trespass, the wrong is not regarded as a continuing one, and damages for the entire loss must be recovered in one action. Making an excavation⁹⁰ or embankment⁹¹ on plaintiff's land, or filling up his pond,⁹² are instances where this rule has been properly applied.⁹³ In these cases there is continuing damage, but no continuing conduct. The trespass—the wrong—was completed once for all.

Damage Caused by Permanent Structures.

Where permanent structures have been erected which result in injury to land, there is much confusion and conflict in the authorities as to whether all the damages, past and prospective, may be recovered in a single suit, or whether successive actions must be brought to recover compensation for the damage as it arises. The confusion is largely due to a lack of clear conception as to the fundamental nature of legal rights. The terms "legal" and "illegal," "rightful" and "wrongful," have not been used with precision; and, as a consequence, precedents have been misapplied. It is impossible to reconcile all the cases. One line of decision holds that where

⁸⁶ Damages can be recovered for the unauthorized obstruction of a stream by a dam only up to the commencement of suit. *Langford v. Owsley*, 2 Bibb, 215; *Williams v. Water Co.*, 79 Me. 543, 11 Atl. 600; *Van Hoozier v. Railroad Co.*, 70 Mo. 145; *Thayer v. Brooks*, 17 Ohio, 489; *Bare v. Hoffman*, 79 Pa. St. 71.

⁸⁷ *Blunt v. McCormick*, 3 Denio, 283. See, also, *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Spilman v. Navigation Co.*, 74 N. C. 675; *Winchester v. Stevens Point*, 58 Wis. 350, 17 N. W. 547; *Moore v. Hall*, 3 Q. B. Div. 178.

⁸⁸ *Cumberland & O. C. Corp. v. Hitchings*, 65 Me. 140.

⁸⁹ *Cheshire Turnpike v. Stevens*, 13 N. H. 28.

⁹⁰ *Kansas P. Ry. Co. v. Muhlman*, 17 Kan. 224; *Clegg v. Dearden*, 12 Q. B. 576.

⁹¹ *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027.

⁹² *Finley v. Hershey*, 41 Iowa, 389.

⁹³ Where defendant flooded plaintiff's mine by breaking through into it, the entire damage must be recovered in one action. *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 23 N. W. 781; *Lord v. Manufacturing Co.*, 42 N. J. Eq. 157, 6 Atl. 812.

permanent structures are erected, resulting in injury to lands, all damages may be recovered in a single suit. Thus, it was said in an Iowa case:⁹⁴ "Where a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated." So, it has been held that compensation for the entire loss, both past and prospective, caused by a railroad embankment, must be recovered in one suit.⁹⁵ But even in such cases the ordinary rule has been applied in some states, and damages are recoverable only to the commencement of the action.⁹⁶

Reverting to first principles for a moment, the whole matter becomes clear. If the structure is expressly authorized, there is no liability for the damage necessarily resulting. If it is authorized on condition that compensation be made for the resulting damage (a condition commonly imposed by the authorizing act or the constitution), and it is permanent in its nature, its continuance may reasonably be presumed, and full compensation for both past and prospective losses may be recovered in one action.⁹⁷ It is on this principle that the railroad embankment case, *supra*, and other like cases,

⁹⁴ *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495. See, also, *Van Orsdol v. Railroad Co.*, 56 Iowa, 470, 9 N. W. 379.

⁹⁵ *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 11 N. E. 467; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 18 N. E. 460. See, also, *Fowle v. New Haven & Northampton Co.*, 112 Mass. 334; *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83; *Adams v. Railroad Co.*, 18 Minn. 260 (Gil. 236).

⁹⁶ *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536; *Duryea v. Mayor, etc.*, 26 Hun, 120; *Blunt v. McCormick*, 3 Denio, 283; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 630, and notes; *Reed v. State*, 108 N. Y. 407, 15 N. E. 735; *Hargreaves v. Kimberly*, 26 W. Va. 787; *Ottenot v. Railroad Co.*, 119 N. Y. 603, 23 N. E. 169; *Barrick v. Schifferdecker*, 123 N. Y. 52, 25 N. E. 365; *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. 229; *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83; *Cobb v. Smith*, 38 Wis. 21; *Delaware & R. Canal Co. v. Wright*, 21 N. J. Law, 469; *Wells v. New Haven & Northampton Co.*, 151 Mass. 46, 23 N. E. 724; *Cooper v. Randall*, 59 Ill. 317; *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693.

⁹⁷ *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460; *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush, 667. But see *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536; *Pond v. Railroad Co.*, 112 N. Y. 186, 19 N. E. 487, and cases cited in preceding note. Cf. *Cadle v. Railroad Co.*, 44 Iowa, 11.

are to be sustained. Of course, if an authorized permanent work is done negligently, and the negligence results in a continuing injury, it cannot be presumed that the negligence will continue, but, rather, that it will be remedied; and compensation can therefore be recovered only to the commencement of the action, and subsequent actions must be brought for damages subsequently accruing.⁹⁸

Where the erection of the structure was a forbidden act, that is, where it was a trespass, and the act of trespass is completed once for all, the entire damage, past and prospective, must be recovered in one suit.⁹⁹ Continuing damage does not make a continuing trespass. There must be continuing conduct as well. Thus, where a trespasser digs a ditch on another's land, and leaves it, the continued existence of the ditch does not make the wrong a continuing trespass.¹⁰⁰ It constitutes merely a continuing damage. The trespass was complete when the trespasser left the premises. Consequently, the entire damages, past and prospective, must be recovered in one action. The trespasser is not guilty of continuing a trespass or maintaining a nuisance because he is under no duty to remedy it. He could not do so without committing a new trespass.

It is sometimes stated that "if a man throws a heap of stones or builds a wall or plants posts or rails on his neighbor's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day until the incumbrance is removed."¹⁰¹ This is essentially not true. The wrongful conduct was complete when the stones or wall were placed on the other's land and the trespasser had departed. He could not

⁹⁸ *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. 229; *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47; *Reed v. State*, 108 N. Y. 407, 15 N. E. 735; *Duryea v. Mayor, etc.*, 26 Hun, 120. See, also, *City of North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821. *Powers v. City of Council Bluffs*, 45 Iowa, 652, relied on in *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495, cannot be sustained. In this case the construction of the ditch by the city was an authorized act, but it was done negligently.

⁹⁹ See *Adams v. Railroad Co.*, 18 Minn. 260 (Gil. 236).

¹⁰⁰ *Kansas Pac. Ry. Co. v. Muhlman*, 17 Kan. 224.

¹⁰¹ 1 Add. Torts, 332. See, also, *Russell v. Brown*, 63 Me. 203. In *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 23 N. W. 781, Cooley, J., draws a distinction between leaving a hole on another's premises, and leaving houses or other obstructions there; saying that physical hindrances are a continuance of the original force, and therefore are continuing trespasses, but that a hole

then remove them without committing a new trespass. The tort is completed, but the damage is continuing. The law is not so absurd as to hold one liable for continuing what it forbids him to discontinue. But where the trespasser remains in possession and control, or maintains or uses the structure erected by him, then we have a continuing trespass, because there is continuing conduct. Successive actions may therefore be maintained from day to day so long as such trespass is continued. Thus, railroad companies which, by trespass, had entered upon the lands of individuals, and begun the construction and operation of railroads, were held liable as trespassers from day to day so long as the operation of the road was continued.¹⁰² Staying and continuing in a house is a divisible trespass in point of time. There is a fresh trespass on each day.¹⁰³ Judge Cooley pronounced the principle of these decisions not open to criticism. "In each of them there was an original wrong, but there was also a persistency in the wrong from day to day. The plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed."¹⁰⁴

Where the erection of the structure was neither authorized nor forbidden, but it is wrongful, because it results in injury to plaintiff's land,—that is, where it is a nuisance,—though the structure is

is only the consequence of a wrongful force which ceased to operate the moment it was made. The distinction is unsound. See *Kansas Pac. Ry. Co. v. Muhlman*, 17 Kan. 224, 233, per Brewer, J.

¹⁰² *Adams v. Railroad Co.*, 18 Minn. 260 (Gil. 236); *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83.

¹⁰³ Per Parke, B., in *Loweth v. Smith*, 12 Mees. & W. 582. Where a turnpike company had placed buttresses on the plaintiff's land for the support of its road, it was held that a recovery of damages for the trespass did not bar a subsequent action for the continuance of the buttresses. "The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass." *Holmes v. Wilson*, 10 Adol. & E. 503. Brewer, J., said that it was very doubtful whether this ruling could be sustained upon principle. *Kansas Pac. Ry. Co. v. Muhlman*, 17 Kan. 232.

¹⁰⁴ *National Copper Co. v. Minnesota Min. Co.*, *supra*.

permanent in its nature, and "will continue without change from any cause but human labor," and its continuance may be presumed, the damages cannot be estimated beyond the date of bringing the action, because, in the case of an ordinary nuisance, the cause of action is not so much the act of the defendant as the damage resulting from his act, and hence the cause of action does not arise until such consequences occur.¹⁰⁵ Thus, it was held in an action by a tenant against his landlord to recover damages because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's doors and windows, that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term.¹⁰⁶ So, where a railroad company constructed a culvert under its embankment, which damaged land by discharging water upon it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and trespasses.¹⁰⁷

As before stated, all the cases are not consistent with these conclusions, but there is ample authority to sustain them, and it is submitted that they are sound in principle.

116. Damage for which the law affords compensation may be divided into three classes:

- (a) Pecuniary losses, direct and indirect.**
- (b) Physical pain and inconvenience.**
- (c) Mental suffering.**

¹⁰⁵ In *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765, it was said by counsel, *arguendo*: "The distinction which pervades the cases is this: Where the plaintiff complains of a trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained." Approved by Cooley, J., in *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 23 N. W. 781.

¹⁰⁶ *Blunt v. McCormick*, 3 Denio, 283.

¹⁰⁷ *Wells v. New Haven & Northampton Co.*, 151 Mass. 46, 23 N. E. 724. See, also, *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536. Cf. *Fowle v. New Haven & Northampton Co.*, 112 Mass. 334.

It has been seen that the law awards damages only for injuries to person, property, or reputation. An injury in any one of these respects may affect one in one or more of three ways. It may cause (1) pecuniary loss, direct or indirect; (2) physical pain and inconvenience; and (3) mental suffering. All three are proper elements of compensation to be considered in estimating damages. Compensation is necessarily awarded in money, and it will be observed that but one of the elements of damage is pecuniary. Breaches of contract and interference with property rights, where the sole question is as to the value of the property involved, may result solely in pecuniary damage. Damage is said to be pecuniary either when money itself is lost, or the damage is such as can be, and usually is measured by a pecuniary standard.¹⁰⁸ But usually where the injury is to the person, the damage will be, in part at least, nonpecuniary. Thus, a physical injury may result in pecuniary loss from diminished earning power, and also in physical and mental suffering. Physical and mental suffering are nonpecuniary, though none the less actual, elements of injury, and must be compensated in money, though there is no pecuniary standard by which they may be measured. The extent of compensation for such injuries is for the jury.

Pecuniary Losses.

Generally speaking, pecuniary losses are always an element in estimating the damages caused by a wrong. Indeed, in the great majority of cases, it is the most important one. Pecuniary losses are sustained whenever property is taken or damaged, when the profits of a contract are lost, or one's earning capacity diminished. Other forms of pecuniary loss will readily occur to every mind. As a general rule, compensation is always recoverable for such losses when they are the proximate and certain result of an actionable wrong. To this rule there is one exception: The expenses of litigation to obtain compensation for a wrong, though the natural and probable consequence of an injury, cannot usually be recovered as damages.¹⁰⁹

¹⁰⁸ Sedg. Dam. p. 95.

¹⁰⁹ *Flanders v. Tweed*, 15 Wall. 450; *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994; *Kelly v. Rogers*, 21 Minn. 146; *Winkler v. Roeder*, 23 Neb. 706, 37 N. W. 607; *Atkins v. Gladwish*, 25 Neb. 390, 41 N. W. 347; *Hicks v. Foster*, 13 Barb. 663; *Welch v. Railroad Co.*, 12 Rich. Law, 290; *Barnard v. Poor*, 21 Pick. 378; *Bishop v. Hendrick*, 82 Hun. 323, 31 N. Y. Supp. 502. Not even when the action was vexatious. *Salado College v. Davis*, 47 Tex. 131. In some

Physical Pain and Inconvenience.

Physical pain or inconvenience which is the proximate and certain result of a wrong is always an element of compensation.¹¹⁰ The amount of damages awarded is necessarily left to the sound discretion of the jury, for there is no arithmetical rule by which the equivalent of such injuries in money can be estimated. Damages cannot be recovered for inconvenience or annoyance,¹¹¹ unless it amounts to physical discomfort.¹¹² "The injury must be physical, as distinguished from one purely imaginative. It must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy."¹¹³

Mental Suffering.

Some courts have refused to recognize mental suffering unaccompanied by actionable injury as sufficient harm to be entitled to legal

cases, the jury have been permitted to consider such expenses for the purpose of giving full indemnity. *Whipple v. Cumberland Manuf'g Co.*, 2 Story, 661, Fed. Cas. No. 17,516; *Platt v. Brown*, 30 Conn. 336; *Welch v. Durand*, 36 Conn. 182; *Finney v. Smith*, 31 Ohio St. 529; *Armstrong v. Pierson*, 8 Iowa, 29; *Rose v. Belyea*, 1 Hann, 109.

¹¹⁰ *Pierce v. Millay*, 44 Ill. 189; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *City of Chicago v. Jones*, 66 Ill. 349; *City of Chicago v. Langlass*, Id. 361; *City of Chicago v. Elzeman*, 71 Ill. 131; *Chicago & E. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *McKinley v. Railroad Co.*, 44 Iowa, 314; *Stafford v. City of Oskaloosa*, 64 Iowa, 251, 20 N. W. 174; *Fleming v. Town of Shenandoah*, 71 Iowa, 456, 32 N. W. 456; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695; *Stephens v. Railroad Co.*, 96 Mo. 207, 9 S. W. 589; *Ridenhour v. Railway Co.*, 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. St. 290; *Lake Shore & M. S. Ry. Co. v. Frantz*, 127 Pa. St. 297, 18 Atl. 22; *Goodno v. Oshkosh*, 28 Wis. 300.

¹¹¹ *Hamlin v. Railway Co.*, 1 Hurl. & N. 408; *Hunt v. D'Orval*, Dud. (S. C.) 180; *Connell v. Telegraph Co.*, 116 Mo. 34, 22 S. W. 345; *Russell v. Telegraph Co.*, 3 Dak. 315, 19 N. W. 408; *Wilcox v. Railroad Co.*, 3 C. C. A. 73, 52 Fed. 264; *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

¹¹² *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Southern Kan. Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817; *Emery v. City of Lowell*, 109 Mass. 197; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695; *Luse v. Jones*, 39 N. J. Law, 707; *Ives v. Humphreys*, 1 E. D. Smith, 196; *Scott Tp. v. Montgomery*, 95 Pa. St. 444. But see *Walsh v. Railway Co.*, 42 Wis. 23.

¹¹³ *Westcott v. Middleton*, 43 N. J. Eq. 478, 486, 11 Atl. 490; Id., 44 N. J. Eq. 297, 18 Atl. 80. And see *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052.

recognition.¹¹⁴ The broadest argument against the award of such damages is—First, that the mental suffering cannot, as a matter of fact, be sufficiently traced as a natural and probable consequence, in the ordinary course of things, of the wrongful conduct complained of; and, second, that if the connection as cause and effect can be traced, the difficulty of determining whether the injuries were caused by the negligent act would be greatly increased, and a wide field would be opened for imaginative claims, and purely speculative litigation encouraged.¹¹⁵ Sometimes, however, the case is said to rest on the limitation as to natural and probable consequences of defendant's conduct,¹¹⁶ and sometimes "on the difficulty of the character of the damages."¹¹⁷

While the general analogy from other actions in tort, and other potent considerations, justify such actions,¹¹⁸ the general trend of decision denies, in the absence of statute, the right to recover for mental suffering, unaccompanied by other injury resulting from failure to deliver a telegraph message.¹¹⁹ Where, however, one has established his cause of action for harm to his person, property, or reputation, he may then recover for injured feelings and mental suffering.¹²⁰ Thus, where there has been an injury to the body,

¹¹⁴ "Mental pain and anxiety the law cannot value, and does not pretend to redress, where the unlawful act complained of causes that alone." *Lynch v. Knight*, 9 H. L. 577-598. *Wyman v. Leavitt*, 71 Me. 227, per Virgin, J.; *Gulf, C. & S. F. Ry. Co. v. Levy*, 59 Tex. 543; *Indianapolis & St. L. Ry. Co. v. Stables*, 62 Ill. 313; *Canning v. Williamstown*, 1 Cush. 451. See note by Mr. Campbell Black, on "Mental Suffering," in 11 C. C. A. 556; *Duggan v. Baltimore & O. R. R.*, 159 Pa. St. 248, 28 Atl. 182, 186.

¹¹⁵ *Victorian Railways Com'rs v. Coultas*, 13 App. Cas. 222; *The Corsair*, 145 U. S. 335-338, 12 Sup. Ct. 949.

¹¹⁶ *Phillips v. Dickerson*, 85 Ill. 11.

¹¹⁷ *Canty, J.*, in *Francis v. W. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1082. And see *Rowell v. W. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534 ("intolerable litigation"); *Bovee v. Town of Danville*, 53 Vt. 190. Cf. *Oliver v. La Valle*, 36 Wis. 592.

¹¹⁸ *Francis v. W. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078; *W. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490.

¹¹⁹ *Summerfield v. W. U. Tel. Co.*, 87 Wis. 1, 57 N. W. 973; *Francis v. W. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078; *Chapman v. Telegraph Co.*, 88 Ga. 763, 15 S. E. 901; *Tyler v. W. U. Tel. Co.*, 54 Fed. 634; *Kester v. W. U. Tel. Co.*, 55 Fed. 603.

¹²⁰ *Morgan v. Curley*, 142 Mass. 107, 7 N. E. 726 (assault and battery); *Wy-*

damages for incidental and future mental suffering may be recovered.¹²¹ But it has been held mental suffering induced by the plaintiff's crippled or repulsive appearance is not a basis for damages.¹²²

While damages cannot be recovered for mere peril,¹²³ or fright,¹²⁴ as a distinct element of damage, still peril and fright, as a part of mental agony,¹²⁵ may be considered by the jury,—as fear of hydrophobia from the bite of a dog.¹²⁶

Injury to the good name and character of a family, and the shame, mortification, and mental suffering of a parent because of the seduction of a child, are proper elements of damage.¹²⁷ Indeed, courts have gone so far as to recognize the right to recover for injured sensibilities in cases of unlawful interference with dead bodies.¹²⁸

man v. Leavitt, 71 Me. 227 (assault and battery); *Goddard v. Railway Co.*, 57 Me. 202; *Beach v. Hancock*, 27 N. H. 223; *Phillips v. Hoyle*, 4 Gray, 568 (malicious prosecution); *Hatch v. Fuller*, 131 Mass. 574. And see *Pennsylvania Co. v. Graham*, 63 Pa. St. 200; *Smith v. Railroad Co.*, 23 Ohio St. 10; *McMahon v. Railroad Co.*, 39 Md. 438. The federal courts have not recognized mental anguish pure and simple as making out a cause of action. *W. U. Tel. Co. v. Wood*, 6 C. C. A. 432, 57 Fed. 471; *Kester v. W. U. Tel. Co.*, 55 Fed. 603; *Gahan v. W. U. Tel. Co.*, 59 Fed. 433; *Crawson v. W. U. Tel. Co.*, 47 Fed. 544.

¹²¹ *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 606; *W. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577; *Kennedy v. Sugar Refinery*, 125 Mass. 90; *Nourse v. Packard*, 138 Mass. 307; *Curtis v. Railroad Co.*, 18 N. Y. 534; *Stewart v. Ripon*, 38 Wis. 584; *Fry v. Railroad Co.*, 45 Iowa. 416; *Reinke v. Bentley* (Wis.) 63 N. W. 1055; *Allen v. Railway Co.* (Tex. Civ. App.) 27 S. W. 943 (mental anguish from fright); *Stutz v. Chicago & N. W. R. Co.*, 73 Wis. 147, 40 N. W. 653; *Phillips v. Dickerson*, 85 Ill. 11; *Coffin v. Varila* (Tex. Civ. App.) 27 S. W. 956 (physical and mental suffering from false imprisonment).

¹²² *Bovee v. Danville*, 53 Vt. 183; *Chicago, B. & Q. R. Co. v. Hines*, 45 Ill. App. 299. Contra, *Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 119 Mo. 256, 24 S. W. 472; *St. Louis S. W. Ry. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887.

¹²³ *American Waterworks Co. v. Dougherty*, 37 Neb. 373, 55 N. W. 1051. Actual damages cannot be recovered for mental anguish caused by fright, unaccompanied by physical injury. *Chicago, R. I. & T. Ry. Co. v. Hitt* (Tex. Civ. App.) 31 S. W. 1084.

¹²⁴ *Southern Pac. Co. v. Ammons* (Tex. Civ. App.) 26 S. W. 135.

¹²⁵ *San Antonio & A. P. Ry. Co. v. Corley* (Tex. Sup.) 29 S. W. 231.

¹²⁶ *Warner v. Chamberlain*, 7 Houst. (Del.) 18, 30 Atl. 638.

¹²⁷ *Garretson v. Becker*, 52 Ill. App. 256; *Phelin v. Kenderdine*, 20 Pa. St. 354.

¹²⁸ *Meagher v. Driscoll*, 99 Mass. 281; *Smith v. Railroad Co.*, 23 Ohio St. 10; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Baltimore & O. R. Co. v. Kean*, 65 Md. 394, 5 Atl. 325.

A person's recovery for mental anguish is confined to his feelings as to himself, and does not extend to his anxiety for third persons.¹²⁹

117. EXEMPLARY DAMAGES—Exemplary damages are damages awarded in addition to compensation, in cases of aggravated torts, as a punishment of the offender.

Exemplary damages are punitive or vindictive damages inflicted in view of the grossness of the wrong done, rather than as a measure of compensation. They are "smart money" added to proper compensation.¹³⁰ They are allowed whenever a case of tort shows wanton invasion of another's right, or any circumstance of oppression, outrage, or insult.¹³¹ If a pauper's hair is cut off, to "take down pride," not for the sake of cleanliness, malice is a consideration in determining the amount of damage.¹³² In *Tullidge v. Wade*,¹³³ the defendant secured the confidence of the plaintiff's family, and seduced his daughter under her father's roof. It was held that damages "for example's sake" could be recovered. Such damages are allowed in cases of extreme negligence, but only for negligence of a gross and flagrant character, evincing reckless disre-

¹²⁹ *Keyes v. Railway Co.*, 36 Minn. 290, 30 N. W. 888.

¹³⁰ *Day v. Woodworth*, 13 How. 363.

¹³¹ *Amer v. Longstreth*, 10 Pa. St. 145; *Abbott, J.*, in *Sears v. Lyons*, 2 Starkie, 317; *Huxley v. Berg*, 1 Starkie, 98; *Seeman v. Feeney*, 19 Minn. 79 (Gil. 54); *Cameron v. Bryan*, 89 Iowa, 214, 56 N. W. 434 (vicious dog); *Paddock v. Somes*, 51 Mo. App. 320 (continued discharge of sewage); *Hanewacker v. Ferman*, 47 Ill. App. 17 (sale of liquor to habitual drunkard); *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474 (wrongful levy). And see *State v. Jungling*, 116 Mo. 162, 22 S. W. 688 (Id.); *Cronfeldt v. Arrol*, 50 Minn. 327, 52 N. W. 857 (Id.); *Com. v. Magnolia, V. L. & I. Co.*, 163 Pa. St. 99, 29 Atl. 793 (wrongful attachment); *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020 (libel and slander); *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501 (malicious trespass); *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101 (malicious prosecution). *Trespass quare clausum fregit: Illinois & St. L. R. & Coal Co. v. Ogle*, 92 Ill. 353.

¹³² *Forde v. Skinner*, 4 Car. & P. 239. In estimating the amount of punitive damages, defendant's wealth may be considered by the jury. *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060.

¹³³ 3 Wils. 18.

gard of human life and safety.¹³⁴ They are awarded alike upon conduct punishable as a crime and conduct not so punishable.

The allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded;¹³⁵ and in some jurisdictions it is repudiated, but in others it is firmly established. It is to be sustained mainly upon the ground of authority and convenience.¹³⁶

Who Liable.

A master may be held liable for exemplary damages for the torts of his servant committed within the course of his employment, although such conduct be not previously authorized or subsequently ratified, provided the servant violate a duty which the master owed to the plaintiff, in such a way as to justify the award of such damages against the servant.¹³⁷ Some difficulty has been experienced in extending this liability to the principal, as distinguished from a master, for the unauthorized and unratified tort of the agent,¹³⁸ as distinguished from a servant; but unnecessarily, except as the particular circumstances under consideration may have justified.¹³⁹ Punitive damages are now frequently awarded against private corporations.¹⁴⁰ It is commonly,¹⁴¹ but not universally,¹⁴² held that a rail-

¹³⁴ *Central Pass. Ry. Co. v. Chatterson* (Ky.) 29 S. W. 18; *Louisville & N. R. Co. v. Greer* (Ky.) 29 S. W. 337.

¹³⁵ *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489.

¹³⁶ See Hale, *Dam. c. 7*, for arguments pro and con.

¹³⁷ *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513-518, 20 N. E. 109; *Hawes v. Knowles*, 114 Mass. 518; *Gulf, C. & S. F. Ry. Co. v. Reed*, 80 Tex. 362, 15 S. W. 1105 (ratification); *Parsons v. Winchell*, 5 Cush. 592; *Singer Manuf'g Co. v. Holdfodt*, 86 Ill. 455; *Bass v. Chicago & N. W. Ry. Co.*, 36 Wis. 450; *Sullivan v. Philadelphia & Reading R. Co.*, 30 Pa. St. 234.

¹³⁸ *Hagan v. Providence & W. R. Co.*, 3 R. I. 88; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261; *Staples v. Schmid* (R. I.) 26 Atl. 193; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760.

¹³⁹ *Rucker v. Smoke*, 37 S. C. 377, 16 S. E. 40.

¹⁴⁰ *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202-223; *Haines v. Schultz*, 50

¹⁴¹ *Lucas v. Michigan Cent. R. Co.*, 98 Mich. 1, 56 N. W. 1039; *Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 South. 495; *Chicago, B. & Q. Ry. Co. v. Bryan*, 90 Ill. 126.

¹⁴² *Pittsburgh, C., C. & St. L. Ry. Co. v. Russ*, 6 C. C. A. 597, 57 Fed. 822; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347.

road company is liable for exemplary damages on account of the malice, wantonness, or oppression of its conductor in ejecting a passenger from a train, or for an assault by him on a passenger.

Willful injury can scarcely, by any possibility, be proved as to municipal corporations.¹⁴³ Such damages have, however, been allowed, in cases which must be regarded as exceptional.¹⁴⁴ And, in general, an award of punitive damages against a city will not be sustained.¹⁴⁵

Matters of Practice.

Whether the evidence is sufficient to justify an allowance of exemplary damages is a question for the court.¹⁴⁶ Whether such damages shall be awarded, and their amount, are questions for the jury.¹⁴⁷ An action cannot be maintained solely for exemplary damages.¹⁴⁸ Matters of aggravation need not be pleaded.¹⁴⁹

N. J. Law, 481, 14 Atl. 488; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238; Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530; Denver & R. G. Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286.

¹⁴³ Chicago v. Kelly, 69 Ill. 475. And see Chicago v. Langlass, 52 Ill. 256; Chicago v. Jones, 66 Ill. 349; Decatur v. Fisher, 53 Ill. 407.

¹⁴⁴ Whipple v. Walpole, 10 N. H. 130; Wallace v. New York, 18 How. Prac. 169; Myers v. San Francisco, 42 Cal. 215.

¹⁴⁵ Chicago v. Langlass, 52 Ill. 256, 66 Ill. 361; Chicago v. Kelly, 69 Ill. 475; Chicago v. Martin, 49 Ill. 241.

¹⁴⁶ Philadelphia Traction Co. v. Orbann, 119 Pa. St. 37, 12 Atl. 816; Pittsburgh S. Ry. Co. v. Taylor, 104 Pa. St. 306; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Selden v. Cashman, 20 Cal. 56.

¹⁴⁷ Nagle v. Mullison, 34 Pa. St. 48; Graham v. Railroad Co., 66 Mo. 536; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456; Johnson v. Smith, 64 Me. 553; Smith v. Thompson, 55 Md. 5; Pratt v. Pond, 42 Conn. 318; Dye v. Dem-

¹⁴⁸ Meidel v. Anthia, 71 Ill. 241; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804; Stacy v. Publishing Co., 68 Me. 279; Ganssly v. Perkins, 30 Mich. 492; Robinson v. Goings, 63 Miss. 500; Jones v. Matthews, 75 Tex. 1, 12 S. W. 823. A right to recover nominal damages is sufficient to sustain a verdict for exemplary damages. Wilson v. Vaughn, 23 Fed. 229; Hefley v. Baker, 19 Kan. 9.

¹⁴⁹ Hale, Dam. p. 225; Gustafson v. Wind, 62 Iowa, 281, 17 N. W. 523; Andrews v. Stone, 10 Minn. 72 (Gil. 52); Wilkinson v. Drew, 75 Me. 360; Southern Exp. Co. v. Brown, 67 Miss. 260, 7 South. 318, and 8 South. 425; Savannah, F. & W. Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 South. 359. Contra, International & G. N. R. Co. v. Smith, 62 Tex. 252; Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 189.

118. AGGRAVATION AND MITIGATION OF DAMAGES

—Where damages are not capable of exact pecuniary measurement, but must be left to the discretion of a jury, evidence of the circumstances of the wrong addressed to the jury for the purpose of influencing its estimate is said to be in aggravation or mitigation of damages.

The terms "aggravation" and "mitigation" of damages are properly used only where the damages are incapable of exact pecuniary measurement. Indemnity is the aim of the law. Where the exact loss is definitely known, the damages cannot be mitigated to less

ham, 54 Ga. 224. It is error to instruct the jury to give exemplary damages. *Wabash, St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296; *Hawk v. Ridgway*, 33 Ill. 473; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Louisville & N. R. Co. v. Brooks' Adm'x*, 83 Ky. 129; *Boardman v. Goldsmith*, 48 Vt. 403; *Snow v. Carpenter*, 49 Vt. 426. Contra, *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565. An instruction that "this is one of the cases where they may give exemplary damages" was held erroneous, where the facts were in dispute. *Pickett v. Crook*, 20 Wis. 358. Under Code Iowa, § 1557, providing that the person injured in her means of support by the intoxication of another shall have a right of action, against the person selling the liquor, "for all damages actually sustained, as well as exemplary damages," it was held proper to instruct the jury that, if plaintiff was entitled to actual damages, it was their duty to add thereto an amount as exemplary damages. *Thill v. Pohlman*, 76 Iowa, 638, 41 N. W. 385. See, also, *Fox v. Wunderlich*, 64 Iowa, 187, 20 N. W. 7. So an instruction that, if an assault was accompanied by certain aggravating circumstances, the jury ought to give exemplary damages, was held not erroneous. *Hooker v. Newton*, 24 Wis. 292. An instruction that the jury cannot give vindictive damages "unless they believe, from the evidence, that the defendants maliciously entered upon plaintiff's land in a rude, aggravating, or insulting manner," is erroneous, because it improperly restricts the standard of liability. *Devaughn v. Heath*, 37 Ala. 595. It is error to submit the question in the absence of evidence. See cases cited *supra*, note 146.

than full and complete compensation; nor can they be aggravated to more than that amount, unless the circumstances justify the imposition of exemplary damages. In other words, evidence in aggravation or mitigation of damages is admissible only when the jury is called upon to assess exemplary damages, or to estimate damages for nonpecuniary injuries, such as physical and mental suffering. For example, provocation is admissible, in an action for assault,¹⁵⁰ to mitigate exemplary damages or damages for mental suffering. Ordinarily, evidence in aggravation or mitigation of damages is inadmissible in actions of contract. These terms are sometimes loosely used to mean evidence of anything that tends to increase or decrease the damages, but the proper sense is that indicated above.¹⁵¹

119. EXCESSIVE AND INADEQUATE DAMAGES —

Where a verdict for damages is grossly excessive or inadequate, the court will set it aside.

In cases where the damages can be readily calculated by a pecuniary standard, as where merely the value of property is involved, a verdict materially greater or less than the amount so ascertained will be set aside. Thus, where a verdict for killing a cow exceeded the market value of the animal as testified to by any of the witnesses, it was set aside as excessive.¹⁵² But even in the case of

¹⁵⁰ *Smith v. Holcomb*, 99 Mass. 552. See, also, *Currier v. Swan*, 63 Me. 323. Provocation cannot mitigate actual damages for assault and battery. *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010. It is proper to charge that the value and influence of an example set by awarding exemplary damages for assault and battery depend upon the social standing of the parties, and that the jury may consider that circumstance in determining the amount. *Id.*

¹⁵¹ See, generally, as to aggravation and mitigation of damages, *Grable v. Margrave*, 3 Scam. 372 (seduction, evidence of defendant's pecuniary ability); *Storey v. Early*, 86 Ill. 461 (libel, defendant's pecuniary ability); *Sayre v. Sayre*, 25 N. J. Law, 235 (slander, evidence of plaintiff's general bad character); *Duval v. Davey*, 32 Ohio St. 604 (slander for charging woman with unchastity, evidence of reputation for chastity); *Mahoney v. Belford*, 132 Mass. 393 (slander, evidence of reputation); *Palmer v. Crook*, 7 Gray, 418 (crim. con., previous state of wife's feeling towards husband). Whether matter is in aggravation or mitigation is for the jury. *Osmun v. Winters*, 25 Or. 260, 35 Pac. 250; *Broughton v. McGrew*, 39 Fed. 672.

¹⁵² *Jacksonville, T. & K. W. Ry. Co. v. Garrison*, 30 Fla. 431, 11 South. 932.

nonpecuniary injuries, where from the nature of things there is no fixed standard of compensation, a court will set aside a verdict which is so excessive that it cannot be accounted for on any other ground than that the jury was misled by passion, prejudice, or ignorance, or when the verdict bears other internal evidence of intemperance in the minds of the jury.¹⁵³

It is said that no verdict for criminal conversation has ever been set aside as excessive.¹⁵⁴

The common practice in cases of excessive verdicts is for the court to enter an order granting a new trial, unless the plaintiff consents to a reduction to such sum as the court shall not deem excessive. But courts interfere reluctantly with a verdict on the mere ground of excessive damages, and never except in a clear case. Each case must depend on its own circumstances. Thus, in one case over \$4,000 was not considered excessive for an unmannerly ejection from a car.¹⁵⁵ In another simple case, however, an order was entered setting aside a verdict of \$800, unless \$400 was remitted by plaintiff.¹⁵⁶ Twenty-five thousand dollars has been held not excessive for injuries to a child,¹⁵⁷ nor to a man rendered a hopeless cripple for

¹⁵³ *Pratt v. Press Co.*, 30 Minn. 41, 14 N. W. 62; *Id.*, 32 Minn. 217, 18 N. W. 836, and 20 N. W. 87 (libel); *Manget v. O'Neill*, 51 Mo. App. 35 (*Id.*); *Woodward v. Glidden*, 33 Minn. 108, 22 N. W. 127 (false imprisonment); *Brosde v. Sanderson*, 86 Wis. 368, 57 N. W. 49 (*Id.*); *New Orleans & O. R. Co. v. Schneider*, 8 C. C. A. 571, 60 Fed. 210 (personal injury); *Cameron v. Bryan*, 89 Iowa, 214, 56 N. W. 434 (*Id.*); *McCoy v. Milwaukee St. Ry. Co.*, 88 Wis. 56, 59 N. W. 453 (*Id.*); *Kelley v. Kelley*, 8 Ind. App. 606, 34 N. E. 1009 (assault). In *Huckle v. Money*, 2 Wills. 207, Lord Camden said: "It is very dangerous for the judge to intermeddle in damages for torts. It must be a glaring case, indeed, of outrageous damages in a tort, and which all mankind, at first blush, must think so, to induce a court to grant a new trial for excessive damages."

¹⁵⁴ 5 Am. & Eng. Enc. Law, 61, citing, as to this wrong and seduction, *Riddle v. McGinnis*, 22 W. Va. 253; *Croze v. Rutledge*, 81 Ill. 266; *Smith v. Master*, 15 Wend. 270; *Norton v. Warner*, 9 Conn. 172; *Rea v. Tucker*, 51 Ill. 110; *Conway v. Nicol*, 34 Iowa, 533; *Harrison v. Price*, 22 Ind. 165.

¹⁵⁵ *Missouri Pac. R. Co. v. Peay*, 7 Tex. Civ. App. 400, 26 S. W. 768; *Nicholds v. Crystal Plate-Glass Co.* (Mo. Sup.) 27 S. W. 516; *East Tennessee, V. & G. Ry. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778.

¹⁵⁶ *Hardenbergh v. St. Paul, M. & M. R. Co.*, 41 Minn. 200, 42 N. W. 933.

¹⁵⁷ *Dunn v. Burlington, C. R. & N. R. Co.*, 35 Minn. 73, 27 N. W. 448.

life.¹⁵⁸ On the other hand, a verdict of \$60,000, recovered against the sergeant at arms of the house of representatives of the United States for a false imprisonment under the orders of the house, and lasting 35 days, has been held excessive.¹⁵⁹

Inadequate Damages.

The same principle which renders courts unwilling to set aside verdicts as being excessive causes them to hesitate to annul verdicts as being too small.¹⁶⁰ Therefore, in an action for an injury to a person's ankle, alleged to have resulted from another's negligence, where the evidence as to the extent of the injury was conflicting, a judgment for \$1,000 was not reversed as being so inadequate as to indicate that it was the result of passion or prejudice.¹⁶¹ So a verdict of six cents for improper detention long enough to have walked across the street was not set aside as inadequate.¹⁶² But if the verdict be so manifestly insufficient as to indicate bias, prejudice, or ignorance on the part of the jury, it will be set aside and a new trial granted.¹⁶³ Thus, an omnibus ran over a man and broke his thigh. He paid £50 to a doctor to set his leg. The jury gave a farthing damages, and he got a new trial.¹⁶⁴ So, where a candidate for office circulated a false report that a girl of unquestioned virtue had been delivered of a bastard child, of which such

¹⁵⁸ Hall v. Chicago, B. & N. R. Co., 46 Minn. 439, 49 N. W. 239; Willard v. Holmes, Booth & Haydens, 2 Misc. Rep. 303, 21 N. Y. Supp. 998.

¹⁵⁹ Kilbourn v. Thompson, 4 MacArthur, 401. For dishonor of a check, \$450: Schaffner v. Ehrman, 139 Ill. 109, 670, 28 N. E. 917.

¹⁶⁰ Townsend v. Hughes, 2 Mod. 150. And see Hamilton v. The William Branfoot, 48 Fed. 914; Id., 3 C. C. A. 155, 52 Fed. 390. Indeed, it was said in Pritchard v. Hewitt, 91 Mo. 547, 4 S. W. 437, that "a new trial will not be granted solely on the ground of the smallness of the damages recovered."

¹⁶¹ Barclay, J., dissenting. Boggess v. Metropolitan St. Ry. Co., 118 Mo. 328, 23 S. W. 159, and 24 S. W. 210.

¹⁶² Henderson v. McReynolds, 60 Hun, 579, 14 N. Y. Supp. 351. See, also, Kalembach v. Michigan Cent. R. Co., 87 Mich. 509, 49 N. W. 1082. A verdict of a dollar has been allowed to stand. Allison v. Railway Co. (Tex. Civ. App.) 29 S. W. 425.

¹⁶³ Henderson v. St. Paul & D. Ry. Co., 52 Minn. 479, 55 N. W. 53; Chesapeake, O. & S. W. R. Co. v. Higgins, 85 Tenn. 621, 4 S. W. 47; Nicholson v. New York & N. H. R. Co., 22 Conn. 74; McDonald v. Walter, 40 N. Y. 551.

¹⁶⁴ Armytage v. Haley, 4 Q. B. 918.

candidate's rival for office was the father. In an action for this slander, the jury returned a verdict for \$5. It was held that the sum allowed was so obviously inadequate as to warrant a reversal.¹⁶⁵

120. Legislation has generally changed the common law as to damages, both as to

(a) The extent of recovery; and

(b) The wrong for which recovery can be had.

Extent of Recovery.

Of the many instances in which the common-law rule as to the extent damages are recoverable has been changed by statute, what are ordinarily known as double or treble damages afford a good illustration. Common-law damages were always single.¹⁶⁶ It is almost universally provided by statute that, as to certain trespasses,—conspicuously, where ornamental shrubs and trees are injured,—double or treble damages may be awarded.¹⁶⁷ Similar provisions are common with respect to killing stock.¹⁶⁸

Damages for Death by Wrongful Act.

Where damages are awarded for death by wrongful act, ordinarily both the cause of action and the extent of recovery are created and determined by statute.¹⁶⁹ The ordinary statutory extent of recovery is the reasonable expectation of pecuniary benefit of the statutory beneficiaries.¹⁷⁰ It is commonly (but not invariably) provided that the recovery shall, under no circumstance, exceed a stated amount.¹⁷¹

¹⁶⁵ *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791.

¹⁶⁶ 1 Burrill, Prac. 237.

¹⁶⁷ *Yocum v. Zahner*, 162 Pa. St. 468, 29 Atl. 778; *Brown v. State*, 100 Ala. 92, 14 South. 761; *Humes v. Proctor*, 73 Hun, 265, 26 N. Y. Supp. 315. *Berg v. Baldwin*, 31 Minn. 541, 18 N. W. 821; *Potulni v. Saunders*, 37 Minn. 517, 35 N. W. 379.

¹⁶⁸ *Spealman v. Missouri Pac. R. Co.*, 71 Mo. 434; *Scott v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 136; *Henderson v. Railroad Co.*, 81 Mo. 605.

¹⁶⁹ Ante, p. 186, "Death by Wrongful Act."

¹⁷⁰ *Kelley v. Central R. Co.*, 48 Fed. 663; *Boden v. Demwolf*, 56 Fed. 846. See *Houghkirk v. President, etc.*, 92 N. Y. 219.

¹⁷¹ *Hale, Dam.* p. 297; *Tiffany, Death by Wrongf. Act*, p. 177.

Civil Damage Acts.

In many states it is expressly enacted that liquor dealers may be held liable in civil damages for harm caused by the sale of intoxicants.¹⁷²

¹⁷² Black, Intox. Liq. c. 13; Cooley, Torts, pp. 283-307. Among the more recent illustrative cases on this subject are *State v. Cox*, 1 Kan. App. 447, 40 Pac. 816; *Cornellus v. Hultman*, 44 Neb. 441, 62 N. W. 891; *Franklin v. Frey* (Mich.) 63 N. W. 970; *Ford v. Cheever*, Id. 975; *Plucknett v. Tippey*, 43 Neb. 342, 63 N. W. 845.

Part II.

SPECIFIC WRONGS.

CHAPTER VI.

WRONGS AFFECTING FREEDOM AND SAFETY OF PERSON.

- 121. False Imprisonment—Definition.
- 122. Who Liable.
- 123–127. Defenses.
- 128. Assault—Definition.
- 129. Battery—Definition.
- 130. Assault and Battery—Force and Intent.
- 131. Defenses.
- 132. Justification.
- 133. Mitigation.

FALSE IMPRISONMENT—DEFINITION.

121. False imprisonment is the unlawful and total restraint of the liberty of the person.

Legality of Restraint.

The restraint must be illegal, but need not be malicious. Lawful authority to restrain the freedom of locomotion of another person is a full defense to an action for false imprisonment.¹ At common law, the arrest of a privileged person was not the basis for an action of false imprisonment, because such arrest is voidable only, and not void. It could not constitute a trespass, and so was unavailable and insufficient as a foundation for the action.² The arrest of the person may have been entirely proper, but subsequent detention, as for an unreasonable time, or refusal to accept any or reasonable bail, may

¹ Diehl v. Friester, 37 Ohio St. 473. Post, p. 247; Bird v. Jones, 7 Adol. & E. (N. S.) 742–752, 7 Q. B. 742.

² Deyo v. Van Valkenburgh, 5 Hill, 242; Kreiser v. Scofield, 10 Misc. Rep. 350, 31 N. Y. Supp. 23; Smith v. Jones, 76 Me. 138.

constitute false imprisonment.³ At common law, trespass, not case, lay for false imprisonment.⁴ Accordingly, liability proceeded, not on the theory of evil motive or of negligence, but of acting at peril.⁵ Therefore, to entitle the plaintiff to recover, it is not necessary for him to allege or prove either malice or want of probable cause.⁶ Malice is material only so far as the question of damage is concerned.⁷ It is immaterial whether the detention be accomplished with or without legal process.⁸

Sufficiency of Restraint.

The restraint must be total, not partial. A man is not imprisoned who has an escape opened to him. A mere partial obstruction of his will does not constitute an actionable restraint of his liberty. Thus, where one entered an inclosure by which another had appropriated a part of the public highway for seats to view a boat race, and was prevented from going onward, but was allowed to remain or go back as he chose, it was held that there was no total restraint, or forcible detention against his will, constituting false imprisonment.⁹

Every confinement of the person is an imprisonment, whether it be in a common prison or a private house, or in the stocks, or even

³ *Manning v. Mitchell*, 73 Ga. 660; *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Gibbs v. Randlett*, 58 N. H. 407.

⁴ 1 Chit. Pl. (14th Am. Ed.) p. 185; *Withers v. Henley*, Cro. Jac. 379; *Maher v. Ashmead*, 30 Pa. St. 344. In Michigan, trespass on the case lies for false imprisonment (by statute). *Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000.

⁵ *State v. Hunter*, 106 N. C. 796, 11 S. E. 366; *Landrum v. Wells*, 7 Tex. Civ. App. 625, 26 S. W. 1001.

⁶ *Cunningham v. East River Electric Light Co.* (Super. N. Y.) 17 N. Y. Supp. 372; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011; *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223; *Rosen v. Stein*, 54 Hun, 179, 7 N. Y. Supp. 368. See *Krebs v. Thomas*, 12 Ill. App. 266; *Neall v. Hart*, 115 Pa. St. 347, 8 Atl. 628; *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885.

⁷ *Johnson v. Bouton*, 35 Neb. 898, 53 N. W. 995; *Hewitt v. Newburger*, 66 Hun, 230, 20 N. Y. Supp. 913. But see *Frazier v. Turner*, 76 Wis. 562, 45 N. W. 411.

⁸ *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77.

⁹ *Bird v. Jones*, 7 Q. B. 742, 7 Adol. & E. (N. S.) 742, 752. See, also, *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 890; *Wright v. Wilson*, 1 Ld. Raym. 739; *Mowry v. Chase*, 100 Mass. 79; *Hart v. Flynn*, 8 Dana (Ky.) 190; *French v. Bancroft*, 1 Metc. (Mass.) 502.

by forcibly detaining one in the public street.¹⁰ Detention within railway gates until fare is paid may constitute such restraint.¹¹ A fortiori, keeping a suspect in confinement an unreasonable time, without taking him to a magistrate, is actionable restraint.¹²

Actual manual touching of the body is not necessary to constitute false imprisonment. "It is absurd to contend that every imprisonment involves a battery."¹³ So, to make one, through fear, pay fare on a public ferry, by threatening not to allow him to leave otherwise, is false imprisonment, although the detention was only for 10 or 15 minutes.¹⁴

Even so slight an interference with freedom of locomotion as being shadowed by a detective is sufficient restraint to be the basis of an action for false imprisonment.¹⁵

The detention must be against the will of the plaintiff, "for," said Earl, J., in *Moses v. Dubois*,¹⁶ "if he voluntarily place himself in a situation where another may lawfully do that which has the effect of restraining liberty, especially if he refuses to depart when he may, he cannot complain that he is unlawfully imprisoned against his will." It is, therefore, absolutely essential that plaintiff should know of the imprisonment. Hence, a schoolboy, who was detained from his family by his schoolmaster, to enforce payment of tuition fees, could not recover in trespass for assault and false imprisonment when it was not shown that he knew of the restraint upon his person.¹⁷ There must be some sort of personal coercion. Merely to inform a man that he is under arrest and not take him into custody does not constitute false imprisonment.¹⁸ If an officer informs a man that he

¹⁰ 3 Bl. Comm. p. 127; Year Book, Book of Assizes, fol. 104, p. 85; *Woodward v. Washburn*, 3 Denio, 369.

¹¹ *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77.

¹² *Cochran v. Toher*, 14 Minn. 385 (Gil. 293); *Hopner v. McGowan*, 116 N. Y. 405, 22 N. E. 538.

¹³ *Emmett v. Lyne* (1805) 1 Bos. & P. (N. R.) 255; *Genner v. Sparkes*, 1 Salk. 79; *Searls v. Viets*, 2 Thomp. & C. 224, commenting on earlier cases.

¹⁴ *Smith v. State*, 7 Humph. (Tenn.) 43. Et vide *McNay v. Stratton*, 9 Ill. App. 215.

¹⁵ *Fotheringham v. Adams Exp. Co.*, 36 Fed. 252.

¹⁶ *Dud. (S. C.)* 209; *Spoor v. Spooner*, 12 Metc. (Mass.) 281.

¹⁷ *Herring v. Boyle*, 1 Crompt. & R. 377.

¹⁸ *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899; *Greathouse v. Summerfield*, 25 Ill. App. 296; *Brushaber v. Stegemann*, 22 Mich. 267.

is under arrest, and thereupon the arrested person volunteers to go with the officer and meet the charge, there is no false imprisonment;¹⁹ but it would be otherwise if he went upon compulsion.²⁰ Detention against desire, prevention from going where one may wish, is false imprisonment.²¹

SAME—WHO LIABLE.

122. All persons who accomplish, procure, aid, or assist in an unlawful detention are liable as principals. Liability may also attach by ratification, or by virtue of relationship of parties.

Where one has directly and unlawfully restrained another, as in case of an officer who improperly arrests, he is the immediate wrongdoer, and is, of course, liable. He may be liable alone, or jointly with others.²² It has been said that false imprisonment is an act of trespass, a direct wrong in which the defendant must have personally participated.²³ The defendant, however, is liable if he directed the arrest.²⁴ But merely giving testimony as a com-

¹⁹ Cf. *Genner v. Sparkes*, 1 Salk. 79; *Homer v. Battyn*, Bull. N. P. 62; *Warner v. Riddiford*, 4 C. B. (N. S.) 180, 205; *Russen v. Lucas*, 1 Car. & P. 153,—with *Williams v. Jones*, Hardw. Cas. Temp. 298; *Lawson v. Buzines*, 3 Har. (Del.) 417; *Grainger v. Hill*, 4 Bing. (N. C.) 212; *Marshall v. Heller*, 55 Wis. 392, 13 N. W. 236; *Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000; *Gold v. Bissell*, 1 Wend. 210; *Mowry v. Chase*, 100 Mass. 79.

²⁰ *Pike v. Hanson*, 9 N. H. 491.

²¹ *Wood v. Lane*, 6 Car. & P. 774; *Chinn v. Morris*, 2 Car. & P. 361; *Pocock v. Moore*, Ryan & M. 321. Wherefore, when plaintiff was hoaxed into a paid ride for a horse thief, he could not complain, because he went voluntarily. *State v. Lunsford*, 81 N. C. 528; *Hawk v. Ridgway*, 33 Ill. 473; *Sorenson v. Dundas*, 50 Wis. 335, 7 N. W. 259; *Comer v. Knowles*, 17 Kan. 436.

²² *Clyma v. Kennedy*, 64 Conn. 310, 29 Atl. 539. As to an attorney advising, and the sheriff executing, a void warrant, see *Tenney v. Smith*, 63 Vt. 520, 22 Atl. 659; sheriff and deputy, *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772; sheriff and judge, *Zeller v. Martin*, 84 Wis. 4, 54 N. W. 330; father and son, *Carson v. Dessau* (Super. N. Y.) 13 N. Y. Supp. 232; *Id.*, 142 N. Y. 445, 37 N. E. 493.

²³ *Brown v. Chadsey*, 39 Barb. 253-261.

²⁴ *Hopkins v. Crowe*, 7 Car. & P. 373, 4 Adol. & E. 774. Compare *Davis v. Russell*, 5 Bing. 354. Et vide *Hawkins v. Manston*, 57 Minn. 323, 59 N. W.

plaining witness, or honestly making a complaint, does not attach liability. Such a witness may be liable if he has directed the officer to take the plaintiff into custody.²⁵ Liability may attach because of ratification or adoption of the false imprisonment.²⁶ It may arise out of relationship of master and servant, from application of respondeat superior, on principles already considered.²⁷ It is subject to exemptions previously discussed.²⁸

SAME—DEFENSES.

123. Defenses peculiar to actions for false imprisonment may operate by way of—

- (a) Justification, or
- (b) Mitigation.

124. In an action for false imprisonment a complete justification is made out where it is shown that—

- (a) The arrest was under a sufficient warrant,²⁹ or
- (b) The arrest was lawful without a warrant.

309; *Hewitt v. Newburger*, 141 N. Y. 538, 36 N. E. 593; *Id.*, 66 Hun, 230, 20 N. Y. Supp. 913.

²⁵ *Lock v. Ashton*, 12 Q. B. 871; *West v. Smallwood*, 3 Mees. & W. 418; *Brown v. Chadsey*, 39 Barb. 253; *Nowak v. Waller*, 56 Hun, 647, 10 N. Y. Supp. 190; *Booth v. Kurrus*, 55 N. J. Law, 370, 26 Atl. 1013; *Murphy v. Walters*, 34 Mich. 180; *Coffin v. Varila*, 8 Tex. Civ. App. 417, 27 S. W. 956. Further, as to distinction between action, interference, and mere submission to judgment of tribunal, see *Green v. Elgie*, 5 Q. B. 99; *Austin v. Dowling*, L. R. 5 C. P. 534.

²⁶ *Callahan v. Searles*, 78 Hun, 238, 28 N. Y. Supp. 904. Adopted, *Clark v. Starin*, 47 Hun, 345; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 56 N. W. 9; *Travis v. Standard, etc., Ins. Co.*, 86 Mich. 288, 49 N. W. 140.

²⁷ *Gillingham v. Ohio R. R. Co.*, 35 W. Va. 588, 14 S. E. 243; *Pinkerton v. Gilbert*, 22 Ill. App. 568; *Pearce v. Needham*, 37 Ill. App. 90; *Travis v. Standard Life Acc. Ins. Co.*, 86 Mich. 288, 49 N. W. 141; *Duggan v. Baltimore & O. Ry.*, 159 Pa. St. 248, 28 Atl. 182, 186.

²⁸ Judge acting without jurisdiction, *Rudd v. Darling*, 64 Vt. 456, 25 Atl. 479. Justice and irregular process, *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477; *Booth v. Kurrus*, 55 N. J. Law, 370, 26 Atl. 1013; *Butler v. Potter*, 17 Johns. 145.

²⁹ *Wilmarth v. Burt*, 7 Metc. (Mass.) 257.

125. An arrest under a warrant, of the person described therein, for the offense charged, is justified when the warrant is regular on its face and is issued by a court of competent jurisdiction under regular proceedings in accordance with valid legislation, even though the warrant is, in fact, irregular and voidable, but not when it is void.

126. Both by common law and, commonly, by statute, an arrest without a warrant may sometimes be justified, dependent on the person making the arrest (whether an officer of the law or a private person), the dignity of the offense, and the time and place of its commission.³⁰

Justification by Judicial Warrant.

A sufficient judicial warrant takes away from an imprisonment the essential element of illegality, and completely justifies an arrest.³¹ If the warrant be wrongfully obtained, although upon sufficient legal proceedings, the civil action should be malicious prosecution, and not false imprisonment.³²

It is by no means clear when a warrant is not sufficient to justify the arrest. If it be void on its face, it is, of course, not sufficient.³³ If the arrest is made under process which is voidable only, because of irregularities in the proceedings under which the writ was issued, it would seem that the warrant may not be collaterally attacked.³⁴

³⁰ State v. Lewis, 50 Ohio St. 179, 33 N. E. 405.

³¹ Marks v. Townsend, 97 N. Y. 590; Wilmarth v. Burt, 7 Metc. (Mass.) 257; Jeffries v. McNamara, 49 Ind. 142-145; Finley v. Gutter, 99 Mo. 539, 13 S. W. 87.

³² Hobbs v. Ray, 18 R. I. 84, 25 Atl. 694; Murphy v. Martin, 58 Wis. 278, 16 N. W. 603. Post, p. 359, "Malicious Prosecution."

³³ Gelzenleuchter v. Nlemeyer, 64 Wis. 316, 25 N. W. 442; McLendon v. State, 92 Tenn. 520, 22 S. W. 200; Emery v. Hapgood, 7 Gray, 55; Gold v. Bissell, 1 Wend. 210; Blythe v. Tompkins, 2 Abb. Prac. 468. And see Wachsmuth v. Bank, 96 Mich. 426, 56 N. W. 9; Buzzell v. Emerton, 161 Mass. 176, 36 N. E. 796.

³⁴ Jennings v. Thompson, 54 N. J. Law, 55, 22 Atl. 1008; Fischer v. Langbein, 103 N. Y. 84, 8 N. E. 251; Everett v. Henderson, 146 Mass. 80, 14 N. E. 932; Johnson v. Morton, 94 Mich. 1, 53 N. W. 816. Such a writ has been

and that it justifies an officer in making an arrest under it. Irregularities in the process may be waived, as by giving bail.³⁵

Where, however, the warrant is void, either from material defect in its language, for want of jurisdiction of the court, or because of the court having no power to issue it, the sheriff who executes it, the attorney who prepares it,³⁶ the client who authorizes it, and the witness who causes the arrest, all are liable at common law for the false imprisonment.³⁷ It would seem that if the legislation under which the warrant is issued is invalid, the warrant may still be a good defense.³⁸ If, however, the officer arrests a man not described in the warrant, such authority may mitigate punitive damages, but will not justify the arrest.³⁹ And au contraire, arrest of the right person by the wrong name, through misnomer in the process, without allegation that the true name is unknown, has been held to be false imprisonment.⁴⁰

Justification without Warrant.

An arrest without a warrant may be justified by public authority. At common law, a public police officer is justified in arresting a person whom he has reasonable cause to suspect has committed, or is about to commit, a felony,⁴¹ provided the person arrested be

held to be a justification, even where the officer knew of facts invalidating it. *Marks v. Sullivan*, 9 Utah, 12, 33 Pac. 224. And such process, when set aside as against those who obtained it, leaves acts done under it without justification, and illegal. *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 932.

³⁵ *Neimitz v. Conrad*, 22 Or. 164, 29 Pac. 548; *Carleton v. Akron Sewer Pipe Co.*, 129 Mass. 40. And see *Buzzell v. Emerton*, 161 Mass. 176, 36 N. E. 796.

³⁶ *Barker v. Braham*, 2 W. Bl. 866; *Grumon v. Raymond*, 1 Conn. 40; *Vaughn v. Congdon*, 56 Vt. 111.

³⁷ *Hewitt v. Newburger*, 141 N. Y. 538, 36 N. E. 593. Cf. *People v. Warren*, 5 Hill (N. Y.) 440.

³⁸ *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633; *Trammell v. Russellville*, 34 Ark. 105. Compare *Judson v. Reardon*, 16 Minn. 431 (Gil. 387); *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904.

³⁹ *Holmes v. Blyler*, 80 Iowa, 365, 45 N. W. 756; *Mitchell v. Malone*, 77 Ga. 301; *Ryburn v. Moore*, 72 Tex. 85, 10 S. W. 393. Compare *Knight v. International & G. N. Ry. Co.*, 9 C. C. A. 376, 61 Fed. 87.

⁴⁰ *Hoye v. Bush*, 1 Man. & G. 775; *Scheer v. Keown*, 29 Wis. 586; *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752.

⁴¹ 4 Bl. Comm. 292; *Codd v. Cabe*, 1 Exch. Div. 352; *Galliard v. Laxton*, 2 Best & S. 363.

above the age of seven years,⁴² and in detaining him until he can be brought before a magistrate for examination.⁴³ Where, however, the offense is only a misdemeanor, such an officer is not justified in making an arrest without a warrant unless a breach of the peace is threatened.⁴⁴ He is justified in arresting, without a warrant, a person committing a breach of the peace in his presence,⁴⁵ and in imprisoning him so long as,⁴⁶ but not longer than, there is danger of a renewal of the offense.⁴⁷

A private individual is justified in arresting a person for felony only where the felony has been actually committed, and there are reasonable grounds for suspicion that the person arrested has committed it.⁴⁸ A private individual may also arrest a person actually committing a breach of the peace, but not after the affray has ended.⁴⁹

In America the common law must be construed in connection with the statutes of each state. Generally, however, the substance of the rule stated has been preserved.⁵⁰ The burden of proof is on

⁴² *Marsh v. Loader*, 14 C. B. (N. S.) 535.

⁴³ *Allen v. Wright*, 8 Car. & P. 522; *Hall v. Booth*, 3 Nev. & M. 316.

⁴⁴ *Quinn v. Helsel*, 40 Mich. 576; *Griffin v. Coleman*, 4 Hurl. & N. 205; *Fox v. Gaunt*, 3 Barn. & Adol. 798; *State v. Lewis*, 50 Ohio St. 179, 33 N. E. 405.

⁴⁵ *Timothy v. Simpson*, 1 Crompt. M. & R. 757; *Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000; *Josselyn v. McAllister*, 25 Mich. 45. An officer may imprison one committing an assault, though he was the one assaulted. Anon. Y. B. 5 Hen. VII. fol. 6, pl. 12.

⁴⁶ *Reg. v. Lesley*, 29 Law J. Mag. Cas. 97.

⁴⁷ The mere fact of insanity will not justify an arrest without a warrant. *Look v. Choate*, 108 Mass. 116.

⁴⁸ *Allen v. Wright*, 8 Car. & P. 522; *Hall v. Booth*, 3 Nev. & M. 316; *Holley v. Mix*, 3 Wend. 350. Whereas the public officer may arrest on reasonable grounds of suspicion, even although no felony has been actually committed. *Beckwith v. Philby*, 6 Barn. & C. 635. Et vide *Stev. Dig. Cr. Proc.* c. 12, 1; *Hogg v. Ward*, 3 Hurl. & N. 417, 27 Law J. Exch. 443.

⁴⁹ *Price v. Seeley*, 10 Clark & F. 28; *Hawley v. Butler*, 54 Barb. 490; *Timothy v. Simpson*, 1 Crompt. M. & R. 757; *Phillips v. Trull*, 11 Johns. 486.

⁵⁰ As to arrest by police officer without warrant on suspicion for felony, not in fact committed: *Rohan v. Sawin*, 5 Cush. 281; *Bryan v. Bates*, 15 Ill. 87; *Taylor v. Strong*, 3 Wend. 384; *Quinn v. Helsel*, 40 Mich. 576; *McCarthy v. De Armit*, 99 Pa. St. 63; *Malcolmson v. Scott*, 56 Mich. 459, 23 N. W. 166. But see *Shanley v. Wells*, 71 Ill. 78; *Newton v. Locklin*, 77 Ill.

the defendant to show facts which would create reasonable suspicion in the mind of a reasonable man.⁵¹

Private authority may justify interference with freedom of personal locomotion. Thus, a schoolteacher, in the exercise of the right to make and enforce reasonable rules for the regulation of a school, may without liability detain pupils after school hours.⁵² So, by common law, any one might arrest a dangerous lunatic.⁵³ The justification, however, is not the benefit of the supposed insane person, but self-protection.⁵⁴ Similarly, imprisonment to prevent bodily harm may be justifiable in self-defense.⁵⁵

127. Evidence showing the absence of malice is admissible, not by way of justification, but by way of mitigation of punitive damages.

One who has been wrongfully restrained of liberty of locomotion may recover, not only compensatory damages, but wanton disregard of legal right will entitle him to punitive damage; as in an action by a young girl for humiliation, insult, and wounded sensibility consequent upon her arrest.⁵⁶ While malice or want of proper

103; *Phillips v. Fadden*, 125 Mass. 198; *McLennon v. Richardson*, 15 Gray. 74. Arrest by private person, without warrant, of persons suspected of felony: *Wakely v. Hart*, 6 Bin. 316; *Com. v. Deacon*, 6 Serg. & R. 526; *Reuck v. McGregor*, 32 N. J. Law, 70; *Allen v. Leonard*, 28 Iowa, 529; *Morley v. Chase*, 143 Mass. 396, 9 N. E. 767; *Holley v. Mix*, 3 Wend. 350; *Gurnsey v. Lovell*, 9 Wend. 320.

⁵¹ *Broughton v. Jackson*, 18 Q. B. 378, 21 Law J. Q. B. 266; *Rosenkranz v. Haas* (City Ct. N. Y.) 20 N. Y. Supp. 880. What is reasonable cause depends on the circumstances of each case (*Hogg v. Ward*, 3 Hurl. & N. 417, 27 Law J. Exch. 443; *Joyce v. Parkurst*, 150 Mass. 243, 22 N. E. 899), and is generally a question of law for the courts (*Filer v. Smith*, 96 Mich. 347, 55 N. W. 999). Cf. *White v. McQueen*, 96 Mich. 249, 55 N. W. 843; *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772. But mere impression that innocent defendant resembled the accused does not justify. *Malinlemi v. Gronlund*, 92 Mich. 222, 52 N. W. 627. Street walking: *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579.

⁵² *Fertich v. Michener*, 111 Ind. 472, 11 N. E. 605.

⁵³ *Fletcher v. Fletcher*, 28 Law J. Q. B. 134.

⁵⁴ *Look v. Dean*, 108 Mass. 116.

⁵⁵ *McNay v. Stratton*, 9 Ill. App. 215-220.

⁵⁶ *Ball v. Horrigan*, 65 Hun, 621, 19 N. Y. Supp. 913; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695; *Pearce v. Needham*, 37 Ill. App. 90.

cause is no part of the plaintiff's case in an action for false imprisonment, proof that the defendant believed himself to be legally right in making an improper arrest will mitigate exemplary damages, but will not diminish actual damages.⁵⁷ But compensatory damages are not necessarily limited to actual money losses. For an unlawful incarceration in an insane asylum one may recover, not only money expended in procuring his release, but also for consequent humiliation, shame, disgrace, and injury to reputation.⁵⁸

ASSAULT—DEFINITION.

128. An assault is an attempt with force or violence to inflict corporal injury on another, accompanied by apparent physical means to effect such injury if not prevented.⁵⁹

Generally speaking, to constitute an assault there must be an attempt, which may be either real or apparent. A real attempt occurs when the party assaulting proceeds with intent to accomplish the injury threatened. Thus, in a leading case on this subject, one who, at a parish meeting, advanced with his fist clenched towards the chairman with intent to strike him, but was stopped by the church warden, who sat next but one to the chairman, was held liable for assault.⁶⁰ And where one pursued another with an uplifted whip, intending to strike him, and the latter made his escape, it was held an assault.⁶¹ Accordingly, whenever a real attempt is

⁵⁷ *Holmes v. Blyler*, 80 Iowa, 365, 45 N. W. 756; *Livingston v. Burroughs*, 33 Mich. 511; *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659; *Comer v. Knowles*, 17 Kan. 436; *Sleight v. Ogle*, 4 E. D. Smith, 445; *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899; *Roth v. Smith*, 41 Ill. 314. Good faith as a justification, *Aldrich v. Weeks*, 62 Vt. 89, 19 Atl. 115. Provocation no justification, *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127.

⁵⁸ *Hewlett v. George*, 68 Miss. 703, 9 South. 885.

⁵⁹ *De S. v. De S.*, Lib. Ass. p. 99, pl. 60; *Read v. Coker*, 13 C. B. 850; *Barbee v. Reese*, 60 Miss. 906; *Richmond v. Fisk*, 160 Mass. 34, 35 N. E. 103; *Hays v. People*, 1 Hill, 351; *Bishop v. Ranney*, 59 Vt. 316, 7 Atl. 820.

⁶⁰ *Stephens v. Myers*, 4 Car. & P. 349; *Tindal, C. J.*, saying that, "though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law."

⁶¹ *Mortin v. Shoppee*, 3 Car. & P. 373. So, to shake one's fist in another's

present, and the assaulted person is aware of such attempt, there can be no question that an assault is committed. Apparent attempt occurs when there is no actual purpose or intent to do the injury threatened, but a display of force under such circumstances as to cause one to reasonably expect and fear the injury.⁶²

But in every case there must be an attempt. Threats alone are not sufficient. Mere words, unaccompanied by some act indicating an intention to carry the threat into execution, do not constitute an assault, for the obvious reason that words alone are insufficient to induce, in the mind of a reasonable man, fear of present corporal injury.⁶³ Words, however, may qualify an action or gesture which would ordinarily be considered an assault, and by showing that the assaulting party has no intention to do the violence, removes from the act the element of assault. So the irate farmer, who would have knocked a man down "if it were not for his gray hairs," was not guilty of an assault.⁶⁴ In these cases, the accompanying words negative the idea of immediate injury to the party to whom the words are directed, and hence any alarm or fear which he may entertain on account of such acts and words is groundless and unreasonable. But mere intent to execute the threat is not essential.⁶⁵

Apparent Means of Effecting Attempt.

The civil wrong of assault rests upon the infringement of right of every person "to live in society without being in fear of personal harm."⁶⁶ Hence, in determining the tort of assault, the question always is, was the attempted violence or force sufficient and fitting to put a man of ordinary courage and reason into fear and alarm?⁶⁷

face, and to threaten to strike, is an assault. *Mitchell v. Mitchell*, 45 Minn. 50, 47 N. W. 308.

⁶² *Smith v. Newsam*, 3 Keb. 283; *Anon.*, 1 Vent. 256; *Osborn v. Veitch*, 1 Fost. & F. 317; *Read v. Coker*, 13 C. B. 850.

⁶³ *State v. Merritt*, Phil. (N. C.) 134; *Tatnall v. Courtney*, 6 Houst. (Del.) 437; *Johnson v. State*, 35 Ala. 363; *People v. Yslas*, 27 Cal. 631; *Tuberville v. Savage*, 1 Mod. 3.

⁶⁴ *State v. Crow*, 1 Ired. 375; *Richmond v. Fisk*, 160 Mass. 34, 35 N. E. 103.

⁶⁵ *Beach v. Hancock*, 27 N. H. 223; *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132.

⁶⁶ *Beach v. Hancock*, 27 N. H. 223; *Chapman v. State*, 78 Ala. 463.

⁶⁷ *Pig. Torts*, 296; *Pol. Torts*, 182.

If so, the wrong is effected, independent of the fact that the assaulting party did not harbor the intention to perpetrate the injury menaced. And it would therefore seem that, if one makes a real attempt to inflict corporal injury on another, but such other was not aware of the attempt, there is no civil wrong, because of no apprehension of harm. But, in the crime of assault, the rule is essentially different. Here the intent, as in all criminal acts, becomes a necessary element, and the question is, did the party assaulting make the outward display of force with the intention of effecting the threatened injury? If so, the crime has been committed.⁶⁸ Hence, one might be criminally assaulted though entirely ignorant of the attempt and hence absolutely free from fear.⁶⁹ If the force threatened and the accompanying circumstances are of such a character as to raise, in the mind of a reasonable person, an apprehension of immediate bodily harm, the assault is complete. Thus, if one point an unloaded gun at another, within shooting range, knowing it to be unloaded, it is an assault if such other person has no reason to believe it unloaded. In such cases, he is put in fear and alarm, and it is that which the law proposes to prevent.⁷⁰

BATTERY—DEFINITION.

129. Battery is the unpermitted application of force to the person of another.

Every assault, where carried to the extent of physical contact, becomes a battery, and every battery includes an assault. Battery is an accomplished assault. It consists in a violent, angry, rude, insolent, or unauthorized touching or striking of a person, either by the party guilty of the battery, or by any substance put in mo-

⁶⁸ State v. Crow, 1 Ired. 375; State v. Davis, 1 Ired. 125; McKay v. State, 44 Tex. 43; State v. Godfrey, 17 Or. 300, 20 Pac. 625; People v. Lilley, 43 Mich. 521, 5 N. W. 982. Many authorities hold the contrary.

⁶⁹ People v. Lilley, 43 Mich. 525, 5 N. W. 982; Chapman v. State, 78 Ala. 463.

⁷⁰ Parke, B., in Reg. v. St. George, 9 Car. & P. 483; De S. v. De S., Lib. Ass. p. 99, pl. 60; Beach v. Hancock, 27 N. H. 223; Lewis v. Hoover, 3 Blackf. 407; Osborn v. Velch, 1 Fost. & F. 317; Richardson v. Van Voorhies, 51 Hun, 636, 3 N. Y. Supp. 599; Scribner v. Beach, 4 Denio, 448.

tion by him.⁷¹ The distinction between assault and battery is well illustrated by *Smith v. Newsam*,⁷² where defendant drew a sword and waved it in a menacing manner, but did not touch the plaintiff, and the jury was ordered to find the defendant guilty of assault but not of battery.

ASSAULT AND BATTERY—FORCE AND INTENT.

130. In both assault and battery, liability in tort depends upon—

- (a) Force (attempted in assault, and exerted in battery), in its ordinary sense, or as amounting to not more than contact, or even deception; and
- (b) Fault or intention on the part of the wrongdoer.

Force.

Whenever violence, in its ordinary sense, is threatened or used, an assault or battery is clearly committed. Thus, forcible defilement of a woman is actionable assault and battery.⁷³ It is not necessary, in assault, that any actual violence be done to the person,⁷⁴ and where violence is used it is not indispensably necessary that it should be to the person. Upsetting a chair or carriage⁷⁵ in which a person is sitting is an assault.⁷⁶

Every person has the right to live in society with the sense of perfect security; hence, it is not necessary, to constitute an assault or a battery, that the force, threatened in the one or exerted in the other, be of a violent nature, or of such a character that one would fear or suffer serious bodily injury.⁷⁷ Force, often, is no more than contact. To put one's arms, though tenderly, around a woman's

⁷¹ *Com. v. McKie*, 1 Gray, 61; *Cole v. Turner*, 6 Mod. 149; *Cooper v. McKenna*, 124 Mass. 284; *Boyle v. Case*, 18 Fed. 880.

⁷² 3 Keb. 283 (1674).

⁷³ *Dean v. Raplee*, 75 Hun, 389, 27 N. Y. Supp. 438.

⁷⁴ *Liebstadter v. Federgreen*, 80 Hun, 245, 29 N. Y. Supp. 1030.

⁷⁵ *Hopper v. Reeve*, 7 Taunt. 698.

⁷⁶ *Clark v. Downing*, 55 Vt. 259. And see *Martin v. Shoppee*, 3 Car. & P. 373.

⁷⁷ *Com v. McKie*, 1 Gray (Mass.) 61; *Richmond v. Fisk*, 160 Mass. 34, 35 N. E. 103.

neck against her will, without some innocent reason or excuse, is an assault and battery.⁷⁸ And a man who sat upon a bed occupied by a woman and leaned over her, making repeated and persistent improper proposals, was liable in assault.⁷⁹

Personal offense is what the law aims to relieve against by the action of assault and battery. Ordinarily, indignities do not constitute an assault.⁸⁰

Deception has been sometimes held to be equivalent to force as an ingredient in assault;⁸¹ for one is guilty of assault and battery who knowing that a thing to be eaten contains a foreign substance, and concealing the fact, delivers it to another who innocently eats it and is injured in health.⁸²

Fault or Intention.

The early conception of trespass was, as has been seen, that it lay for a breach of absolute rights corresponding to absolute duties. According to this conception the defendant acted at his peril, and it was immaterial whether he was at fault or not, so long as he actually invaded the sanctity of the plaintiff's person. The later cases, however, incline strongly to recognize that there can be no recovery in assault and battery unless there was fault or intention on the part of the defendant.⁸³ But however slight or however harmless the touch, if rudely, or angrily, or unlawfully done, or in a hostile manner, the wrong is complete.

Every one has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege. But the essence of battery lies more in the animus and manner in which it is done than in the contact itself. Thus, to touch another lightly in a spirit

⁷⁸ Goodrum v. State, 60 Ga. 509.

⁷⁹ Newell v. Whitchee, 53 Vt. 589. Cf. Alexander v. Blodgett, 44 Vt. 476.

⁸⁰ Stearns v. Sampson, 59 Me. 568. And see Meader v. Stone, 7 Metc. (Mass.) 147; Jacobs v. Hoover, 9 Minn. 204 (Gil. 189).

⁸¹ Cooley, Torts, 163; McCue v. Klein, 60 Tex. 168.

⁸² Com. v. Stratton, 114 Mass. 303. The unlawful infliction of an injury by administering poison constitutes an assault. Carr v. State, 135 Ind. 1, 34 N. E. 533.

⁸³ Harvey v. Dunlop, Lalor, Supp. (N. Y.) 193; Stanley v. Powell [1891] 1 Q. B. 86, 60 Law J. Q. B. 52. Cf. Engelhardt v. State, 88 Ala. 100, 7 South. 154.

of pleasantries, or to strike him on the hand or shoulder in conversation in a gentle manner, does not involve a battery.⁸⁴ For a touch or stroke in jest an action will not lie.⁸⁵ But recovery may be had for actual damage resulting from such unpermitted contact, although there was no intention to injure. Thus, where one injured another by kicking him on the leg during school hours, damages were allowed though no injury was intended.⁸⁶

An action will lie for assault and battery though the conduct complained of was reckless only, and not willful. If B., in endeavoring to hit C., hits A., an action will lie by A. against B.⁸⁷ It is not essential that there should be a direct or specific intention to commit an assault and battery at the time the violence is done. Therefore the rider of a bicycle, who ran over a man in plain sight, and only a few feet away, was held liable for an assault and battery, and not for mere negligence.⁸⁸

SAME—DEFENSES.

131. Defenses to an action for assault and battery may operate by way of

- (a) Justification, or
- (b) Mitigation.

132. JUSTIFICATION—The charge of assault and battery may be justified by the person alleged to have committed it by bringing it within the limits of

- (a) Private defense, or
- (b) Legal authority, whether public or private.

⁸⁴ Compare *Coward v. Baddeley*, 4 Hurl. & N. 478, 28 Law J. Exch. 260, and *Wiffin v. Kincard*, 2 Bos. & P. (N. R.) 472, with *Rawlings v. Till*, 3 Mees. & W. 28.

⁸⁵ *Williams v. Jones*, Cas. t. Hardw. 301.

⁸⁶ *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403.

⁸⁷ *Weaver v. Ward*, Hob. 289; *Hopper v. Reeve*, 7 Taunt. 698; *Talmage v. Smith*, 101 Mich. 370, 59 N. W. 656; *Bullock v. Babcock*, 3 Wend. 391; *Com. v. Hawkins*, 157 Mass. 551-553, 32 N. E. 862, collecting cases. Compare *Com. v. Pierce*, 138 Mass. 165-180.

⁸⁸ *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132; *Kendall v. Drake* (N. H.) 80 Atl. 524.

Private Defense of Person.

Assault is justifiable if it is committed in self-defense. In the language of the early law, this was the defense of son assault demesne. In order that self-defense may be justified, assault must have been threatened. Thus, a person is justified in defending himself by shooting his assailant, if he has reason to believe that the assailant intends to do him great bodily harm, and that he is in danger of such harm, and no other means can effectually prevent it.⁸⁹ But, on the other hand, where a creditor followed a debtor, disputing about a bill, saying: "This thing must be settled now," and the latter struck him while he was walking with his hands in his pockets, it was held that no assault had been threatened by the creditor and self-defense was not made out.⁹⁰ To avoid becoming an assailant, however, the person originally attacked need not necessarily retreat.⁹¹

Abusive words, written or spoken, malignant leers, and taunting grimaces, though made for the purpose of inducing an assault, do not justify it. There is said, however, to be an exception to this with respect to words "grossly insulting to females. * * * At least, one would be excused where grossly insulting language was employed in the presence of his family, if he were promptly to put a stop to it by force."⁹²

Same—Defense of Family, Servants, and Friends.

A man has a right to use necessary force to protect his family, neighbors, or servants from violence.⁹³ What a father and the

⁸⁹ Com. v. O'Malley, 131 Mass. 423; Clyma v. Kennedy, 64 Conn. 310, 29 Atl. 539; Chapleyn of Greyes Inne (1400) Y. B. 2 Hen. IV. fol. 8, pl. 40; Keep v. Quallman, 68 Wis. 451, 32 N. W. 233.

⁹⁰ Rhodes v. Rodgers, 151 Pa. St. 634, 24 Atl. 1044. See, also, Morgenstein v. Nejedlo, 79 Wis. 388, 48 N. W. 652; Sargent v. Carnes, 84 Tex. 156, 19 S. W. 378; Hulse v. Tollman, 49 Ill. App. 490.

⁹¹ Haynes v. State, 17 Ga. 465; Tweedy v. State, 5 Iowa, 433; Norris v. Casel, 90 Ind. 143; Steinmetz v. Kelly, 72 Ind. 442; State v. Dixon, 75 N. C. 275; Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116. But see Howland v. Day, 56 Vt. 318.

⁹² Higgins v. Minaghan, 76 Wis. 298, 45 N. W. 127; Minaghan v. State, 77 Wis. 643, 46 N. W. 804; Higgins v. Minaghan, 78 Wis. 602, 47 N. W. 941; Leward v. Basely, 1 Ld. Raym. 62.

⁹³ Leward v. Basely, 1 Ld. Raym. 62; Fields v. Grenils, 89 Va. 606, 16 S. E. 880.

head of a house can legally do in defense of his house the son can do.⁹⁴ The right of the master to come to the defense of his servant does not extend to cases where the servant is the aggressor, nor to cases of mutual assault.⁹⁵

Same—Defense of Property.

A man may justify an assault and battery in defense of his lands,⁹⁶ his house,⁹⁷ or his chattels,⁹⁸ and, generally, of possession or property.⁹⁹ One whose property is taken wrongfully by another may retake it from him, using reasonable force. What is such reasonable force is a question for the jury.¹⁰⁰ The owner of chattels which are on the premises of another has even the right to go on such premises, if he can do so without breach of peace; and if assaulted while so doing, he can recover damages.¹⁰¹ But if a trespasser has gained possession, or if one comes lawfully into possession but unlawfully retains possession, the rightful owner cannot justify an assault to dispossess him.¹⁰²

Same—Commensurate Defense.

Force used in private defense must not exceed the necessity of the case. Defense is not attack. Excessive defense may become an assault and battery.¹⁰³ "In an action for assault and battery, to which the defendant pleads that the plaintiff first assaulted the de-

⁹⁴ *Hammond v. Hightower*, 82 Ga. 290, 292, 9 S. E. 1101; *People v. Foss*, 80 Mich. 559, 45 N. W. 480.

⁹⁵ *Jones v. Fortune*, 128 Ill. 518, 21 N. E. 523.

⁹⁶ *Com. v. Clark*, 2 Metc. (Mass.) 23; *Kliff v. Youmans*, 86 N. Y. 324; *Drew v. Comstock*, 57 Mich. 176, 23 N. W. 721.

⁹⁷ *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446; *State v. Burwell*, 63 N. C. 661; *State v. Peacock*, 40 Ohio St. 333.

⁹⁸ *People v. Dann*, 53 Mich. 490, 19 N. W. 159.

⁹⁹ *Filkins v. People*, 69 N. Y. 101, 106; *Liebstadter v. Federgreen*, 80 Hun, 245, 29 N. Y. Supp. 1039.

¹⁰⁰ *Com. v. Donahue*, 148 Mass. 539, 20 N. E. 171; *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766. And see *Timothy v. Simpson*, 6 Car. & P. 499.

¹⁰¹ *Stuyvesant v. Wilcox*, 92 Mich. 233, 52 N. W. 617.

¹⁰² *Read v. Coker*, 13 C. B. 850; *Gillespie v. Beecher*, 85 Mich. 347, 48 N. W. 561; *Osborn v. Veitch*, 1 Fost. & F. 317; *Beddall v. Maitland*, 17 Ch. Div. 174; *Tullay v. Reed*, 1 Car. & P. 6. Mere possession of premises will not justify violence to prevent the lawful occupant from entering. *Liebstadter v. Federgreen*, 80 Hun, 245, 29 N. Y. Supp. 1039.

¹⁰³ *Beddall v. Maitland*, 17 Ch. Div. 174; *Cockcroft v. Smith*, 2 Salk. 642; *Dole v. Erskine*, 35 N. H. 503.

fendant, who thereupon committed the alleged assault in his own defense, the plaintiff may show that, although he struck the first blow, the defendant was guilty of excess. * * * The old form of defendant's plea, 'molliter manus imposuit,' * * * shows also the full extent to which the law allows a man to defend himself from an unprovoked assault."¹⁰⁴ Therefore, in an action for assault, where it appears that the plaintiff first attacked the defendant, she cannot recover unless the defendant used more force than was necessary in repelling the attack.¹⁰⁵ When resistance exceeds the bounds of mere defense, so as to become vindictive, the defender becomes the aggressor, and may himself commit an assault.¹⁰⁶ "The law," however, "has enough regard for the weakness of human nature to regard a violent attack as sufficient excuse for going beyond the mere necessities of self-defense, and chastising the aggressor within such bounds as did not exceed the natural limits of the provocation."¹⁰⁷

Authority.

Where an officer of justice is charged with an assault and battery, it is a good defense to show that he was at the time engaged in the execution of his official duties, and that the wrong was done in their discharge. If, however, he uses greater force than is necessary to effect the immediate object, he may become civilly liable.¹⁰⁸ Therefore, an officer who, in arresting an unresisting prisoner, threw him down, and pounded him so as to cause him to spit blood, was held personally liable.¹⁰⁹ The exemption from liability, in an assault and battery, on the ground of legal authority, exists

¹⁰⁴ Dean v. Taylor, 11 Exch. 68.

¹⁰⁵ Drinkhorn v. Bubel, 85 Mich. 532, 48 N. W. 710. Et vide Kent v. Cole, 84 Mich. 579, 48 N. W. 168.

¹⁰⁶ Elliott v. Brown, 2 Wend. 497; Gates v. Lounsbury, 20 Johns. 427.

¹⁰⁷ People v. Pearl, 76 Mich. 207, 42 N. W. 1109. But see Harvey v. Mayne, 6 Ir. R. O. L. 417.

¹⁰⁸ Baker v. Barton, 1 Colo. App. 183, 28 Pac. 88; Kreger v. Osborn, 7 Blackf. 74; Baldwin v. Hayden, 6 Conn. 453. Hilliard v. Goold, 34 N. H. 230; Spensley v. Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894.

¹⁰⁹ Schwenke v. Union Depot & R. Co., 12 Colo. 341, 21 Pac. 43. Compare Hager v. Danforth, 20 Barb. 16, with Hull v. Bartlett, 49 Conn. 64. As to liability of constable, Brownell v. Durkee, 79 Wis. 658, 48 N. W. 241. But see Pooler v. Reed, 75 Me. 488.

only when there is an occasion for the exercise of force, and the officers exercising it are authorized to employ it. Therefore, school trustees, who forcibly eject a schoolteacher because of her refusal to consent to a vacation ordered by them, are liable in an assault and battery.¹¹⁰

Parents may chastise their children under age reasonably, but excessive cruelty, arising from malicious motive and resulting in permanent injury, is not justifiable because of parental authority.¹¹¹ The duty may be delegated. A teacher may punish a child.¹¹² He may chastise for violation of only reasonable rules of order.¹¹³ Consequently, chastisement for violation of rule requiring pupils to pay for the destruction of schoolroom property is an assault.¹¹⁴ Violence is justifiable only in case of an emergency at sea.¹¹⁵

133. MITIGATION—Leave and license, and provocation so recent that the mind of the wrongdoer has not had time to cool, while they may not justify battery, it would seem may serve to mitigate punitive damages, though not actual or compensatory damages.

Since the commission of an assault and battery constitutes a misdemeanor, a license from the person assaulted is no justification.¹¹⁶

Provocation does not justify an assault and battery. But it would be an unwise law which did not make allowance for human

¹¹⁰ *White v. Kellogg*, 119 Ind. 320, 21 N. E. 901.

¹¹¹ *Fletcher v. People*, 52 Ill. 395; *State v. Jones*, 95 N. C. 588. The same rule applies to one standing in loco parentis. *Dean v. State*, 89 Ala. 46, 8 South. 38.

¹¹² *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841; *Patterson v. Nutter*, 78 Me. 509, 7 Atl. 273.

¹¹³ *Marlsbary v. State*, 10 Ind. App. 21, 37 N. E. 558.

¹¹⁴ *State v. Vanderbilt*, 116 Ind. 11, 18 N. E. 266.

¹¹⁵ *Padmore v. Piltz*, 44 Fed. 104. Carrier may eject passenger by force for cause. *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420.

¹¹⁶ Ante, p. 118. The absence of anger and the presence of good will in a fight will not alter the character of the assault (*Com. v. Collberg*, 119 Mass. 350), but will mitigate damages (*Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185). See *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473; *Fredericksen v. Singer Manuf'g Co.*, 38 Minn. 356, 37 N. W. 453.

infirmities; and if a person commits violence at a time when he is smarting under immediate provocation, that is a matter of mitigation.¹¹⁸ If there has been time for the mind to cool, the defense is lost.¹¹⁹ An insult to one's wife is not legal provocation.¹²⁰ Publication of a gross insult the night before the assault may, however, serve to mitigate damages.¹²¹

The current language of the cases is that leave and license and provocation are in mitigation of damages. This means of exemplary damages, or damages for mental or physical suffering. Damages for pecuniary losses actually sustained can never be mitigated to less than adequate compensation.¹²²

¹¹⁸ Lord Abinger in *Frazer v. Berkeley*, 7 Car. & P. 621; *Avery v. Ray*, 1 Mass. 12; *Ireland v. Elliott*, 5 Iowa, 478; *Kiff v. Youmans*, 86 N. Y. 324.

¹¹⁹ *Thrall v. Knapp*, 17 Iowa, 468; *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010; *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. 98; *Prindle v. Haight*, 83 Wis. 50, 52 N. W. 1134.

¹²⁰ *Dupee v. Lentine*, 147 Mass. 580, 18 N. E. 465.

¹²¹ *Ward v. White*, 86 Va. 212, 9 S. E. 1021.

¹²² *Birchard v. Booth*, 4 Wis. 67-76. Et vide *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468; *Robison v. Rupert*, 23 Pa. St. 523; *Jacobs v. Hoover*, 9 Minn. 204 (Gil. 189); *Dresser v. Blair*, 28 Mich. 501; *Brown v. Swineford*, 44 Wis. 282; *Prentiss v. Shaw*, 56 Me. 427; *Voltz v. Blackmar*, 64 N. Y. 440; *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010; *Hale, Dam.* p. 107; ante, p. 237.

CHAPTER VII.

INJURIES IN FAMILY RELATIONS.

- 134. The Family at Common Law.
- 135. Master and Servant.
- 136. Parent and Child.
- 137-140. Actions for Injuries to Child.
- 141. Husband and Wife.
- 142-143. Action for Interference with Domestic Rights.
- 144-145. Injuries to Wife—Double Cause of Action.

THE FAMILY AT COMMON LAW.

134. The common law did not recognize the family as a legal entity and as having rights as an association of persons.

“Next to the sanctity of the person comes that of the personal relations constituting the family.”¹ However, it seems that prior to the statute of laborers (23 Edw. III. 1349) no action at law lay for any injury involved in such relations. Among other provisions, it imposed heavy penalties on every person who procured, harbored, or retained the servant of another during the time he had contracted to serve. From this statute arose the actions commonly called “per quod actions,” because of the peculiar wording of the pleadings. The action lay under the statute by the employer against a third person who interfered with the relationship of his servant, “per quod servitium amisit.” This was easily adapted so as to be used by a father for the seduction of his child, and by a husband for abuse by a stranger of his wife (in the form of pleading, “per quod consortium amisit”).

The principle is an important one, and “extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers.”²

¹ Pol. Torts, p. 194. Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 216-253. And see *Bowen v. Hall*, 6 Q. B. Div. 333.

² *Haskins v. Royster*, 70 N. C. 601-605.

MASTER AND SERVANT.

135. Certainly, since the statute of laborers, the common law has recognized the right of a master to recover for the actual damage he may have suffered by the wrongful interference by a third person with his relationship to his servant, by personal injury to the servant, or otherwise depriving the master, in whole or in part, of his service.

Nature of Injury.

The action of the master for loss of service is thus of great antiquity, and had its origin in a state of society where service as a rule was a matter, not of contract, but of status. And the interest of the master was so far regarded as property that the rights which he acquired by agreement, and being rights in personam, became rights in rem, and laid on persons not parties to the contract the duty to forbear from interfering.³

For What Wrong the Action Lies.

The action lies for seduction of servant,⁴ for assault and battery committed against a servant,⁵ for negligence of a person impairing the servant's ability to render service.⁶

Actions for enticing servants from their employer, and for knowingly harboring servants who had previously left their employer, arose after the first statute of laborers.⁷ They survived its repeal, and occur in modern practice.⁸ Knowingly⁹ enticing from the service of another one who is employed under a contract not

³ Grinnell v. Wells, 7 Man. & G. 1033; Plg. Torts, 355 et seq.

⁴ Edmondson v. Machell, 2 Term R. 4.

⁵ Fluker v. Railroad Co., 81 Ga. 461, 8 S. E. 529.

⁶ McCarthy v. Guld, 12 Metc. (Mass.) 291. And see Osborn v. Gillett, L. R. 8 Exch. 88.

⁷ Lumley v. Gye, 2 El. & Bl. 216-253; Bowen v. Hall, 6 Q. B. Div. 333.

⁸ State v. Hoover, 107 N. O. 795, 12 S. E. 451; Bourlier v. Macauley, 91 Ky. 135, 15 S. W. 60; Ward v. State, 70 Miss. 245, 12 South. 249.

⁹ Huntoon v. Hazelton, 20 N. H. 388; Gale v. Parrott, 1 N. H. 28; Caughey v. Smith, 47 N. Y. 244.

fully executed is an actionable wrong.¹⁰ Indeed, from this basis there has grown up a branch of law in which malice is an essential ingredient. Its consideration is therefore postponed until malicious wrongs are under consideration.¹¹ Where the wrongful act causes the death of a servant, however, it was held at common law that no action will lie.¹² No such action lies where the servant breaks no contract.¹³

Form of Action.

The wrong consisted in actual damage by reason of loss of service or capacity to serve.¹⁴ It was not actionable per se. It was therefore necessary to allege per quod, i. e. per quod servitium amisit. The action was not for the direct injury, but for consequent damage. For some time it was doubtful¹⁵ whether trespass or case lay,¹⁶ but it was finally decided that both could be used,—trespass where there was violence, and case where there was deceit or negligence, the latter being the commonest instance.¹⁷

¹⁰ *Philp v. Squire*, Peake, 83; *Haight v. Badgeley*, 15 Barb. 499; *Duckett v. Pool*, 33 S. C. 238, 11 S. E. 689; *Milburne v. Byrne*, 1 Cranch, C. C. 239, Fed. Cas. No. 9,542; *Butterfield v. Ashley*, 2 Gray (Mass.) 254; *Scidmore v. Smith*, 13 Johns. (N. Y.) 322; *Bixby v. Dunlap*, 56 N. H. 456; *Huff v. Watkins*, 15 S. C. 82; *Carew v. Rutherford*, 106 Mass. 1; *Nolce v. Brown*, 39 N. J. Law, 569; *Walker v. Cronin*, 107 Mass. 555; *Ames v. Union R. Co.*, 117 Mass. 541; *Salter v. Howard*, 43 Ga. 601; *Caughey v. Smith*, 47 N. Y. 244.

¹¹ Post, p. 327.

¹² *Osborn v. Gillett*, L. R. 8 Exch. 88.

¹³ Compare *Nichol v. Martyn*, 2 Esp. 734, and *Hart v. Aldridge*, 1 Cowp. 54, with *Keane v. Boycott*, 2 H. Bl. 511; *Blake v. Lanyon*, 6 Term R. 221. Et vide *Campbell v. Cooper*, 34 N. H. 49.

¹⁴ *Fluker v. Railroad Co.*, 81 Ga. 461, 8 S. E. 529; *Knight v. Wilcox*, 14 N. Y. 413.

¹⁵ *MacFadzen v. Olivant*, 6 East. 387; *Evans v. Walton*, L. R. 2 C. P. 615. Debauching a female servant was a trespass. *Edmondson v. Machell*, 2 Term R. 4.

¹⁶ *Moran v. Dawes*, 4 Cow. (N. Y.) 412.

¹⁷ *Chamberlain v. Hazelwood*, 5 Mees. & W. 515; *Martinez v. Gerber*, 3 Man. & G. 88.

PARENT AND CHILD.

136. The common law recognized the right of a parent to recover for wrongs committed against a child, whenever such parent suffered damage thereby through the loss of the service of his child. In order that a parent should be able to recover at common law for harm done to his child, he must show—

(a) Injury to the child.

(b) Consequent loss by the parent of the service of the child.

The common law regarded the right of the parent to recover for the seduction, enticement, or other injuries to the child as interruption of the relationship of master and servant, and not of parent and child, and did not undertake to compensate the father for wounded sensibilities.¹⁸ Accordingly, the recovery of the parent was based upon, and varied with, the damage done because of the loss of service, and on the relationship of master and servant, not parent and child. The form of action was “per quod servitium amisit.”¹⁹ To entitle the parent to recover, he must show the existence of the relationship of master and servant. Therefore, the parent’s right of action terminates whenever the child leaves the parent’s house with intention not to return.²⁰ It has been held, however, that if the child in fact returns to the father, the defendant is liable.²¹ So, when the child has been emancipated by the parent, the right to recover is gone.²²

It is not necessary to show that the child rendered valuable services. Pouring tea, or milking cows, has been held to be an act of service.²³ Even a married daughter living apart from her husband

¹⁸ *Evans v. Walton*, L. R. 2 C. P. 615.

¹⁹ *Martin v. Payne*, 9 Johns. (N. Y.) 387; *Cooley*, Torts, 268, et seq.

²⁰ *Dean v. Peel*, 5 East, 45. Et vide *Griffiths v. Teetgen*, 15 C. B. 344; *Manley v. Field*, 7 C. B. (N. S.) 96.

²¹ *Martin v. Payne*, 9 Johns. 387.

²² *McCarthy v. Boston & L. R. Corp.*, 148 Mass. 550, 20 N. E. 182.

²³ *Carr v. Clarke*, 2 Chlt. 261; *Mann v. Barrett*, 6 Esp. 32.

may, in this sense, render services to her father.²⁴ Proof of actual service of an infant is unnecessary. Right to service is enough.²⁵ If the child is of age, there must have been loss of service to entitle the parent to recover.²⁶ The legal right of the parent at the time to command the service of the child, though she resides and is temporarily employed elsewhere, is sufficient.²⁷ It rests on his legal obligation to provide for her support and education, and his consequent right to the profits of her labor.²⁸

This fiction of service as the basis of the right of the parent to sue for wrongs done the child is generally recognized in America, although much criticised.²⁹

SAME—ACTIONS FOR INJURIES TO CHILD.

137. At common law the right to command the service of the child, even though temporarily employed elsewhere, determined the proper party plaintiff in an action to recover for wrongs to the child.

²⁴ *Harper v. Luffkin*, 7 Barn. & C. 387. So where the daughter is an adult: *Sutton v. Huffman*, 32 N. J. Law, 58. Et vide *Lipe v. Eisenlerd*, 32 N. Y. 229.

²⁵ *Bartley v. Richtmyer*, 4 N. Y. 39-47.

²⁶ *Martin v. Payne*, 9 Johns. 387; *Keller v. Donnelly*, 5 Md. 211; *Vossel v. Gole*, 10 Mo. 634; *Mulvehall v. Millward*, 11 N. Y. 342.

²⁷ *Boyd v. Byrd*, 8 Blackf. (Ind.) 113. Even though the seducer was her employer: *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4. Et vide *Bartley v. Richtmyer*, 4 N. Y. 38; *White v. Murtland*, 71 Ill. 250; *Kennedy v. Shea*, 110 Mass. 147; *Furman v. Van Sise*, 56 N. Y. 435; *Clark v. Fitch*, 2 Wend. (N. Y.) 459, 20 Am. Dec. 639; *Mohry v. Hoffman*, 86 Pa. St. 358; *Benson v. Remington*, 2 Mass. 113; *Greenwood v. Greenwood*, 28 Md. 369; *Doyle v. Jessup*, 29 Ill. 460; *Knight v. Wilcox*, 14 N. Y. 413; *Blagge v. Ilsley*, 127 Mass. 191; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458. These cases go beyond the English rule. *Dean v. Peel*, 5 East, 45; *Blaymire v. Haley*, 6 Mees. & W. 55; Compare *Hedges v. Tagg*, L. R. 7 Exch. 283-285. This is true even where the child is an imbecile. *Hahn v. Cooper*, 84 Wis. 629, 54 N. W. 1022.

²⁸ *Kennedy v. Shea*, 110 Mass. 147 (citing cases); *Martin v. Payne*, 9 Johns. 387.

²⁹ *Ellington v. Ellington*, 47 Miss. 329; *Mulvehall v. Millward*, 11 N. Y. 343; *Clark v. Fitch*, 2 Wend. (N. Y.) 459; *Kennedy v. Shea*, 110 Mass. 147. So in England: Sergeant Manning's note to *Grinnell v. Wells*, 7 Man. & G. 1063-1044.

At common law the proper party plaintiff was determined by the person who was entitled to the service of the child. Any one entitled to such service could bring suit for wrong to the child.³⁰ The father was the normal plaintiff.³¹ The mother's right to recover is based upon her right to the service of the child, and therefore could not exist until she became entitled to the child's service by the death—or, by statute, the desertion—of the father.³² Generally, any person who stands in loco parentis, and who was entitled to the service of the child, may recover. Thus, a guardian,³³ or a stranger in blood who has adopted the person seduced, may be a proper party plaintiff.³⁴

At Common Law the Seduced Child Could not Recover against Her Seducer.

The seduced child could not recover at common law, not only because in many cases she was a party to the wrong, but because the only recognized action was based upon the loss of service.³⁵ The injustice of the common-law rule is well illustrated by *Ellington v. Ellington*.³⁶ There a daughter made her permanent home with her seducer, her uncle. Her parent could not sue, for the child was out of his service and beyond control; the child could not sue, for she was particeps criminis; the uncle could not sue, for he was the

³⁰ *Hamilton v. Lomax*, 26 Barb. (N. Y.) 615; *Pence v. Dozier*, 7 Bush (Ky.) 133; *Ellington v. Ellington*, 47 Miss. 329; *White v. Nellis*, 31 N. Y. 405.

³¹ *Vossell v. Cole*, 10 Mo. 634.

³² *Furman v. Van Sise*, 56 N. Y. 435; *Sargent v. —*, 5 Cow. (N. Y.) 106. Et vide *Ryan v. Frallick*, 50 Mich. 483, 15 N. W. 561. Cf. *South v. Denniston*, 2 Watts, 474.

³³ *Fernsler v. Moyer*, 3 Watts & S. (Pa.) 416; *Blanchard v. Ilsley*, 120 Mass. 487.

³⁴ *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661. So a stepparent: *Bartley v. Richtmyer*, 4 N. Y. 38. Putative grandfather: *Moritz v. Garnhart*, 7 Watts (Pa.) 302. An aunt: *Edmondson v. Machell*, 2 Term R. 4. An uncle: *Manvell v. Thomson*, 2 Car. & P. 303; *Davidson v. Goodall*, 18 N. H. 423; *Clark v. Fitch*, 2 Wend. (N. Y.) 459; *Maguinay v. Saudek*, 5 Sneed (Tenn.) 146; *Martin v. Payne*, 9 Johns. (N. Y.) 387; *Mulvehall v. Millward*, 11 N. Y. 343; *Ball v. Bruce*, 21 Ill. 161.

³⁵ *Hutchinson v. Horn*, 1 Ind. 363; *Smith v. Richards*, 29 Conn. 232; *Hamilton v. Lomax*, 26 Barb. (N. Y.) 615; *Pence v. Dozier*, 7 Bush (Ky.) 133.

³⁶ 47 Miss. 329-340.

author of the outrage. "Thus, the ruin of the girl must go unrevenge, and the author of it go unwhipt of justice."

138. Exemplary damages were allowed to the parent for seduction, abduction, and the like, so that recovery for the injury to the relation of parent and child, rather than of master and servant, was secured.

No action apart from statute can be maintained by the father for injury in his parental capacity; but in the struggle between substantial justice to the parent and the precedents, the courts, in actions for seduction, have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation as master, and permitting a recovery in his relation as a parent.⁸⁷ The allowance by the court of punitive damages enabled them to make the fiction of service innocent, and to do substantial justice, notwithstanding it. He may recover "all he can feel from the nature of the injury."⁸⁸

139. Statutory changes and judicial decisions tend to abolish the fiction of service, and to recognize the right of the parent to sue for the injury to the family relation, and of the child to recover for its own peculiar wrong. The consent of the child to intercourse would bar its right to recover, but not the right of the parent. Consent of the parent would bar his right to recover, and his indifference may mitigate damages.

By statutes of various kinds, and in varying degrees, the fiction of proof of loss of service as a condition precedent to the right of the parent to recover for injuries done to the child has been, to a

⁸⁷ McClure v. Miller, 11 N. C. 133. "However difficult to reconcile to principle of giving greater damages," said Lord Ellenborough, in Irwin v. Dearman, 11 East, 24, "the practice is become inveterate and cannot now be shaken." Et vide Barbour v. Stephenson, 32 Fed. 66; Dain v. Wycoff, 7 N. Y. 191, 18 N. Y. 45; Chellis v. Chapman, 125 N. Y. 214-218, 26 N. E. 308.

⁸⁸ Garretson v. Becker, 52 Ill. App. 255; Phelln v. Kenderdine, 20 Pa. St. 354.

large extent, abolished.³⁹ The tendency of legislation and decision is to recognize the reasonable view that when a child is injured the parent suffers one injury, which, according to circumstances, may or may not be based upon lawful service; and the child, another and distinct injury; and the master, under some circumstances, a further damage in loss or diminution of service.

What is Seduction.

Seduction is the act of a man in enticing a woman to commit unlawful sexual intercourse with him by means of persuasion, solicitation, promises, bribes, or other means without the employment of force.⁴⁰

It has been insisted that mere persuasion of a previously chaste woman, if followed by illicit intercourse, as the result thereof, may constitute seduction.⁴¹ An unchaste woman, who has reformed, may be seduced.⁴² A criminal assault, or rape, however, is not properly the basis of an action in the form of seduction, although it may entitle to as great damages.⁴³ There is no substantial difference between seduction and debauchery, as a cause of action.⁴⁴

Recovery by the Person Seduced.

The right of an unmarried female to sue for her own seduction, and of the father (or, in case of his death or desertion, the mother) to sue for damages for seduction, although the daughter be not living with, or in the service of, the parents, or although there be no loss of service, is now enforced by many courts.⁴⁵ Where, how-

³⁹ Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696 (see How. Ann. St. §§ 7779-7781).

⁴⁰ Black, Law Dict. 1074.

⁴¹ Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272. Et vide Badder v. Keefer, 91 Mich. 611, 52 N. W. 60; Hallock v. Kinney, 91 Mich. 57, 51 N. W. 706.

⁴² Patterson v. Hayden, 17 Or. 238, 21 Pac. 129; People v. Clark, 33 Mich. 112.

⁴³ Hodges v. Bales, 102 Ind. 494, 1 N. E. 692. But see Watson v. Watson, 53 Mich. 168, 18 N. W. 605; Kennedy v. Shea, 110 Mass. 147.

⁴⁴ Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696.

⁴⁵ Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397; Ellington v. Ellington, 47 Miss. 329; McCoy v. Trucks, 121 Ind. 202, 23 N. E. 93; Stevenson v. Belknap, 6 Iowa, 97. Et vide Becker v. Mason, 93 Mich. 336, 53 N. W. 361; Hawn v. Banghart, 76 Iowa, 683, 39 N. W. 251.

ever, the intercourse is merely the result of mutual desire,⁴⁶ or of a mere appeal to passion,⁴⁷ seduction is not made out so as to entitle the woman seduced to recover. There must be some pretense or artifice used.⁴⁸ A promise to marry is not essential to constitute the wrong, but will aggravate damages.⁴⁹

Recovery by Parent.

The consent of an infant daughter is not a bar to the father's recovery.⁵⁰ The parent may, however, be disentitled by his consent to the seduction, and, by negligence or indifference, reduce the damages to which he may be entitled.⁵¹ Pregnancy is not essential to constitute seduction. Communication of venereal disease is sufficient;⁵² or incapacity to labor, without pregnancy or disease.⁵³ It is not material to the father's recovery whether the wrong done was accomplished by force, artifice, or persuasion.⁵⁴

Damages.

Damages in seduction exhibit the logical application of the general principles as to damages. General damages may be recovered,⁵⁵ but not remote damages; as for the illness of the daughter three months after seduction, produced by threats of a suit for seduction.⁵⁶ Recovery may be had for the natural consequences

⁴⁶ *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361. As to consent after resistance, see *Egan v. Murray*, 80 Iowa, 180, 45 N. W. 563.

⁴⁷ *Hawn v. Banghart*, 76 Iowa, 683, 39 N. W. 251.

⁴⁸ *Balley v. O'Bannon*, 28 Mo. App. 39.

⁴⁹ *Franklin v. McCorkle*, 16 Lea (Tenn.) 609; *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361.

⁵⁰ *White v. Murtland*, 71 Ill. 250; *Leucker v. Stellen*, 89 Ill. 545.

⁵¹ *Travis v. Barger*, 24 Barb. (N. Y.) 614; *Smith v. Masten*, 15 Wend. (N. Y.) 270. As where father allowed young people while courting to sleep together. *Seagar v. Silgerland*, 2 Caines (N. Y.) 219; *Zerfing v. Mourer*, 2 G. Greene (Iowa) 520.

⁵² *White v. Nellis*, 31 N. Y. 405.

⁵³ *Abrahams v. Kidney*, 104 Mass. 222.

⁵⁴ *Lawrence v. Spence*, 99 N. Y. 669, 2 N. E. 145; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599.

⁵⁵ *Simons v. Busby*, 119 Ind. 13, 21 N. E. 451.

⁵⁶ *Knight v. Wilcox*, 14 N. Y. 413. Compare this case with *Blagge v. Ilsley*, 127 Mass. 191. Compare *Boyle v. Brandon*, 13 Mees. & W. 738, with *Manvell v. Thomson*, 2 Car. & P. 303.

which resulted from the wrong.⁵⁷ Thus, pregnancy, childbirth, sickness, and the loss of social standing,⁵⁸ may be considered in the assessments of damages, where the female is the plaintiff.⁵⁹ Loss of service during the child's minority,⁶⁰ expense incurred, mental suffering, family dishonor, and the demoralizing influence on other children, are proper elements of damages to be considered by the jury, where the action is by the parent.⁶¹ Punitive damages may be awarded.⁶² Previous unchastity, the willingness of the child, the indifference of the parent in exposing his child before the seduction, and the insensibility, will all serve to mitigate damages.⁶³ The pecuniary condition of the seducer may be considered.⁶⁴

Other Injuries to Children.

An action lies by the parent for the abduction, the enticement, or wrongfully harboring a child, as well as for its seduction.⁶⁵ Thus, a father may sue a mother who enticed his daughter for the benefit

⁵⁷ *White v. Murtland*, 71 Ill. 250; *Klopper v. Bromme*, 26 Wis. 372; *Brown v. Kingsley*, 38 Iowa, 220; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79.

⁵⁸ *Hawn v. Banghart*, 76 Iowa, 683, 39 N. W. 251.

⁵⁹ *Wilson v. Shepler*, 86 Ind. 275.

⁶⁰ *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95, 16 N. E. 65. Some proof of loss of service necessary. *Grinnell v. Wells*, 7 Man. & G. 1033; *Eager v. Grimwood*, 1 Exch. 61.

⁶¹ *Phillips v. Hoyle*, 4 Gray (Mass.) 568; *Rollins v. Chalmers*, 51 Vt. 592; *Wandell v. Edwards*, 25 Hun, 498; *Barbour v. Stephenson*, 32 Fed. 66; *Stiles v. Tilford*, 10 Wend. 338; *Hatch v. Fuller*, 131 Mass. 574; *Leucker v. Stellen*, 89 Ill. 545; *Grable v. Margrave*, 4 Ill. 372; *Phelin v. Kenderdine*, 20 Pa. St. 354.

⁶² *Terry v. Hutchinson*, L. R. 3 Q. B. 599; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599; *Badgley v. Decker*, 44 Barb. (N. Y.) 577; *Morgan v. Ross*, 74 Mo. 318; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Giese v. Schultz*, 69 Wis. 521, 34 N. W. 913; *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661; *Baird v. Boehner*, 77 Iowa, 622, 42 N. W. 454; *Kerns v. Hagenbuehle* (Super. N. Y.) 17 N. Y. Supp. 369.

⁶³ *Bolton v. Miller*, 6 Ind. 263; ante, p. 237. See *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Cochran v. Ammon*, 16 Ill. 316; *Peters v. Lake*, 66 Ill. 209; *Hoffman v. Kemerer*, 44 Pa. St. 452; *White v. Murtland*, 71 Ill. 250; *Rea v. Tucker*, 51 Ill. 110.

⁶⁴ *Peters v. Lake*, 66 Ill. 206; *Mullin v. Spangenberg*, 112 Ill. 140; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599.

⁶⁵ *Stowe v. Heywood*, 7 Allen, 118; *Loomis v. Deets* (Md.) 30 Atl. 612.

of her son.⁶⁶ But the parent may not recover damages for the improper expulsion of his child from school,⁶⁷ or procure an injunction to prevent publication of its portrait,⁶⁸ because there is no loss of service, and the law does not compensate for such sentimental suffering.

The law, regarding the right of service as property,⁶⁹ recognizes two classes of injuries, when an infant suffers personal injury, as distinguished from seduction, viz. the injury of the parent because of his loss of service consequent upon the damages done, and the injury of the child because of the damage inflicted upon him. The right of the father to recover indemnity for expense of care, medical attendance, and the like, to which he was put by injury to his child, although it were incapable of rendering service, was duly recognized.⁷⁰ This doctrine has been declared until it is now asserted without reservation that an action of this sort rests, not upon the relation of master and servant, but upon that of parent and child, and that the damages may include a reasonable allowance for prospective loss of service, based upon the evidence in the case.⁷¹ The infant may sue, by the proper statutory parties, for the damage he suffers; and the father, on his peculiar separate cause of action. Each cause of action has its peculiar rule of damages. Thus, where the child has not been emancipated by the parent, not he, but the father, is entitled to compensation for his diminished capacity to earn money during the time intervening between the injury and his arrival at majority.⁷² The father may also recover actual loss of service, as distinguished from prospective, and expenses necessarily consequent on the care and cure of the child.⁷³ The negligence of the parent in allowing the child to undertake employment

⁶⁶ *Bradley v. Shafer*, 64 Hun, 428, 19 N. Y. Supp. 640.

⁶⁷ *Donahoe v. Richards*, 38 Me. 376; *Spear v. Cummings*, 23 Pick. 224.

⁶⁸ *Murray v. Gast Lithographic & Engraving Co.*, 8 Misc. Rep. 36, 28 N. Y. Supp. 271.

⁶⁹ *Hall v. Hollander*, 4 Barn. & C. 660.

⁷⁰ *Dennis v. Clark*, 2 Cush. (Mass.) 347.

⁷¹ *Netherland-American Steam Nav. Co. v. Hollander*, 8 C. C. A. 169, 59 Fed. 417; *Cumling v. Brooklyn City R. Co.*, 109 N. Y. 95, 16 N. E. 65.

⁷² *Texas & P. Ry. Co. v. Morlu*, 66 Tex. 225, 18 S. W. 503.

⁷³ *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104.

exposing him to dangers disproportioned to his years and discretion may prevent recovery.⁷⁴

140. So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid, comfort, and obey, it would seem that no action for tort will lie on behalf of such child against a parent.

The reason assigned for this rule is that "the peace of society and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child the right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." Therefore a minor daughter, who had been married, but who, at the time of the alleged injury, was separated and living apart from her husband, cannot sue her parents for unlawful incarceration in an insane asylum.⁷⁵

HUSBAND AND WIFE.

141. No action in tort ordinarily lies between the husband and wife for injury to person or reputation, although it may, under statute, lie for injuries to separate property.

While it may be true that the law does not recognize the family, as an abstract entity, it recognizes and protects the various relationships involved. The right of the husband to moderately correct his wife, if at one time recognized,⁷⁶ has probably passed entirely away.⁷⁷ Nor has the husband any right, when his wife re-

⁷⁴ *Weaver v. Iselin*, 161 Pa. St. 386, 29 Atl. 49.

⁷⁵ *Hewlett v. George*, 68 Miss. 703, 9 South. 885.

⁷⁶ *State v. Rhodes*, 1 Phil. (N. C.) 453.

⁷⁷ *Cooley*, Torts (2d Ed.) 262, citing *Pearman v. Pearman*, 1 Swab. & T. 601; *People v. Winters*, 2 Parker, Cr. R. 10; *Com. v. McAfee*, 108 Mass. 458; *Poor v. Poor*, 8 N. H. 307-313.

fuses to live with him, to take her person by force, and restrain her of her liberty until she is willing to render to him conjugal rights.⁷⁸ The wife can sustain no action for a tort by the husband to her person or reputation, even after divorce, where the tort was committed upon her while the relationship existed.⁷⁹ With the development of the modern law as to separate property of a wife, however, the right of the husband to sue his wife, and of the wife to sue her husband, for torts arising out of injury to property, has been recognized.⁸⁰

SAME—ACTION FOR INTERFERENCE WITH DOMESTIC RIGHTS.

142. At common law, on the fiction of services lost, and, generally, under existing law, largely on the theory of pure tort, a husband not disentitled by his own conduct, may maintain an action against a third person for wrongful violation of, or interference with, the personal domestic duties owed him by his wife, notwithstanding her acquiescence in the wrong.

143. The corresponding right of the wife to sue has been frequently, but not universally, recognized.

Action by the Husband for Defilement of the Wife.

As against an adulterer, a husband had at common law an action of criminal conversation. This has been abolished.⁸¹ The

⁷⁸ *Cochrane's Case*, 8 Dowl. 630, overruled by *Reg. v. Jackson* [1891] 1 Q. B. 671.

⁷⁹ *Freethy v. Freethy*, 42 Barb. 641; *Longendyke v. Longendyke*, 44 Barb. 366; *Phillips v. Barnet*, 1 Q. B. Div. 436; *Peters v. Peters*, 42 Iowa, 182; *Main v. Main*, 46 Ill. App. 106; *Abbott v. Abbott*, 67 Me. 304; *Libby v. Berry*, 74 Me. 286; *Schultz v. Schultz*, 89 N. Y. 644, 27 Hun, 26-34. A husband cannot sue his wife to recover damages for deceit by which he was induced to marry her. *Kujek v. Goldman*, 9 Misc. Rep. 34, 29 N. Y. Supp. 294.

⁸⁰ *Mason v. Mason*, 66 Hun, 386, 21 N. Y. Supp. 306; *Ryerson v. Ryerson*, 55 Hun, 611, 8 N. Y. Supp. 738; *Burns v. Kirkpatrick*, 91 Mich. 364, 51 N. W. 893. See *Smith v. Smith*, 78 Mich. 445, 41 N. W. 499, 500.

⁸¹ 20 & 21 Vict. c. 85, §§ 33-39.

real remedy for many years was the action, adapted from that for enticing away a servant *per quod servitium amisit*, in the form *per quod consortium amisit*. The same latitude being allowed in the estimate of the husband's damages as were granted the parent in suing for seduction made the proceeding almost a penal one.⁸² The tendency of current legislation and decision, however, is to base the action on the pure theory of tort, and to ignore the limitation introduced by the fiction of service. The willingness or unwillingness of the wife, the loss or the absence of service, does not affect the right of the husband to sue. The essential right injured is the right of a man to exclusively beget his own children. Loss of society, affection, and service will be presumed.⁸³ Consent of the husband, whether to the specific act, or general immorality of the wife, is a bar to his right to recovery.⁸⁴ And his own previous infidelity during marriage may mitigate damages.⁸⁵

Action by the Husband for Alienation of the Wife's Affections.

To entitle the husband to recover, it is not necessary that she should have been seduced or debauched. An action lies for the alienation,⁸⁶ or even for the partial alienation,⁸⁷ of her affections.

Under the action *per quod consortium amisit*, the husband could recover for the "comfort and assistance" of his wife. In *Winsmore v. Greenbank*,⁸⁸ the loss to the husband for which an action lay

⁸² 3 Bl. Comm. 139, 140; *Cornelius v. Hambay*, 150 Pa. St. 359, 24 Atl. 515.

⁸³ *Bigaouette v. Paulet*, 134 Mass. 123; *Weedon v. Timbrell*, 5 Term R. 360; *Yundt v. Hartrunft*, 41 Ill. 9; *Peters v. Lake*, 66 Ill. 206; *Wales v. Miner*, 89 Ind. 118; *Hadley v. Heywood*, 121 Mass. 236; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Barnes v. Allen*, 30 Barb. (N. Y.) 603.

⁸⁴ *Schorn v. Berry*, 63 Hun, 110, 17 N. Y. Supp. 572; *Fry v. Drestler*, 2 Yeates, 278; *Cook v. Wood*, 30 Ga. 891.

⁸⁵ *Smith v. Masten*, 15 Wend. (N. Y.) 270; *Rea v. Tucker*, 51 Ill. 110.

⁸⁶ *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417; *Higham v. Vanosdol*, 101 Ind. 160; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Heermance v. James*, 47 Barb. (N. Y.) 120.

⁸⁷ *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252.

⁸⁸ *Willes*, 577. See, also, *Wood v. Mathews*, 47 Iowa, 410; *Turner v. Estes*, 3 Mass. 316; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Modisett v. McPike*, 74 Mo. 636; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Campbell v. Carter*, 3 Daly (N. Y.) 165; *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485.

was that he had had a fortune left to her separate use. The action lies where the wife is retained against the inclination of her husband. If, however, he has ill-treated her, and another person acts in mere hospitality, there is no responsibility.⁸⁹ A parent, while he may not restrain his daughter, who has left an indifferent husband, from returning to him, may counsel her for her own good to remain away, and offer her a home and a living.⁹⁰ The parent's motive will be presumed to be good, unless it be shown to be evil. The parent will not be liable for sheltering the wife or advising her to leave her husband.⁹¹ But a stranger does such things at his peril. He may justify himself by showing good faith and good cause, but the burden is on him to prove it.⁹² The soundness of this distinction has been seriously questioned.⁹³ And there is exceedingly good authority against it.⁹⁴

Action by the Husband for Miscellaneous Wrongs.

The common law went to great length to protect the husband against the wrongful interference with his domestic rights by third persons. Any one who knowingly assists the wife in the violation of her duty as such is guilty of a wrong for which an action will lie, when injury is thereby inflicted on the husband.⁹⁵ Therefore, an action may be maintained against a druggist for selling a wife a dangerous quantity of laudanum.⁹⁶

Action by Wife for Enticement of Husband.

The common-law right of a married woman to sue a third person for the seduction or enticing away of her husband has been denied,

⁸⁹ Berthon v. Cartwright, 2 Esp. 480; Philp v. Squire, 1 Peake, 114; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417.

⁹⁰ White v. Ross, 47 Mich. 172, 10 N. W. 188; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085.

⁹¹ Huling v. Huling, 32 Ill. App. 519-522 (collecting cases).

⁹² Higham v. Vanosdol, 101 Ind. 160-166; Modisett v. McPike, 74 Mo. 636.

⁹³ Bennett v. Smith, 21 Barb. (N. Y.) 439.

⁹⁴ Tasker v. Stanley (1891) 153 Mass. 148, 26 N. E. 417; Winsmore v. Greenbank, Willes, 577; Philp v. Squire, 1 Peake, 82; Turner v. Estes, 3 Mass. 316; Stowe v. Heywood, 7 Allen (Mass.) 118; Holtz v. Dick, 42 Ohio St. 23; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Schuneman v. Palmer, 4 Barb. (N. Y.) 225.

⁹⁵ Barnes v. Allen, 30 Barb. (N. Y.) 663, per Latt, J.

⁹⁶ Hoard v. Peck, 56 Barb. (N. Y.) 202.

because at common law the property of the husband was the property of the wife, and such damages, if recovered, would become his property. Therefore, it has been urged, to allow her to recover would involve the absurdity that the husband might also sue for such a cause.⁹⁷ On the other hand, it has been insisted that, in natural justice, no reason exists why the right of the wife to maintain an action against the seducer of her husband should not be co-extensive with his right of action against her seducer. The weight of authorities and the tendency of the legislation strongly incline to the latter opinion.⁹⁸ An action by the wife against her mother-in-law for the enticement of a husband has been entertained on principles similar to those giving the corresponding right of action to the son.⁹⁹ The measure of her damages in such cases is the actual injury caused by the loss of her husband's affection and support, and exemplary damages when the injury is willful and wanton, according to the defendant's pecuniary circumstances.¹⁰⁰

SAME—INJURIES TO WIFE—DOUBLE CAUSE OF ACTION.

144. Where the injuries to the wife complained of do not arise from a state of facts in which the wife's own wrong is an essential part, there are two distinct causes of action:

- (a) The injury to the wife;**
- (b) The injury to the husband.**

⁹⁷ *Duffies v. Duffies* (1890) 76 Wis. 374, 45 N. W. 522; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328; *Doe v. Roe*, 82 Me. 503, 20 Atl. 83. Et vide *Lynch v. Knight*, 9 H. L. Cas. 577; *Reader v. Purdy*, 41 Ill. 279-282; *Kroessin v. Keller* (1895) 60 Minn. 372, 62 N. W. 438.

⁹⁸ *Westlake v. Westlake*, 34 Ohio St. 621; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842; *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776; *Bassett v. Bassett*, 20 Ill. App. 543; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389; *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 308; *Mehroff v. Mehroff*, 26 Fed. 13; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17.

⁹⁹ *Hulling v. Hulling*, 32 Ill. App. 519.

¹⁰⁰ *Waldron v. Waldron*, 45 Fed. 315.

145. At common law the husband was a necessary party to proceedings on both causes of action. This has been generally, but not universally, changed by statute, so as to allow the husband and the wife to sue separately and in their own names for their respective damages.

In most of the cases already considered, the wrong involved is exclusively the husband's. The wife's own conduct in itself is a wrong to him. But, whenever she is innocent, the legal aspect of the facts change entirely. The woman who consents to adultery is in a very different position in law from that occupied by the unfortunate victim of a rape. And the right of a husband to sue for the injuries of his wife, caused by either violence or negligence, is not inconsistent with her right to recover on the same state of facts. His damage is consequential, and consists of loss of service, society, medical expenses, and other incidental losses.¹⁰¹ Her damage is direct, and arises from the injury to her person, her individual suffering, and similar harm.

Parties Plaintiff.

This was distinctly recognized by the common law.¹⁰² But, under its peculiar doctrine as to this relationship, the husband and wife were required to be joined as parties plaintiff in an action for personal injuries to her. This requirement has generally been changed by statute so that ordinarily, but not always,¹⁰³ the wife

¹⁰¹ Skoglund v. Railway Co., 45 Minn. 330, 47 N. W. 1071; Blair v. Railroad Co., 89 Mo. 334, 1 S. W. 367; Reading v. Pennsylvania R. Co., 52 N. J. Law, 284, 19 Atl. 321; Brooks v. Schwerin, 54 N. Y. 343; Mewhirter v. Hatten, 42 Iowa, 288.

¹⁰² Hyatt v. Adams, 16 Mich. 180; Michigan Central R. Co. v. Coleman, 28 Mich. 439 (reviewing cases, page 444); Burt v. McBain, 29 Mich. 262.

¹⁰³ Fournet v. Steamship Co., 43 La. Ann. 1202, 11 South. 541. Et vide Barker v. Railway Co., 92 Ala. 314, 8 South. 466; Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407; Mewhirter v. Hatten, 42 Iowa, 288; Tuttle v. Chicago, R. L. & P. R. Co., Id. 518; Stone v. Evans, 32 Minn. 243, 20 N. W. 149. The husband and wife have separate injuries on which to base action for criminal assault on the wife. Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79. As to violation of right of husband and wife to sleep together, vide Pullman Palace-Car Co. v. Bales (Tex. Sup.) 14 S. W. 855; Id., 80 Tex. 211, 15 S. W. 785.

may recover for her peculiar injury, and the husband for his.¹⁰⁴ She may certainly recover for injuries to a business carried on by her as a feme sole,¹⁰⁵ when such injuries are specially pleaded.¹⁰⁶ Thus, he may sue alone for damage done her person, caused by the negligence of another.¹⁰⁷ Inasmuch as the services of a married woman belong to her husband, any injury to her, injuriously affecting them, would naturally be a part of the damages which he can recover.¹⁰⁸ But a physical injury impairing her capacity to labor has been classified with pain and suffering, and she has been held to have such an interest in her working capacity that she can recover for its impairment the amount depending on the nature of the injury and the length of time during which the pain and deprivation will continue.¹⁰⁹ Where the wife cannot recover for personal injuries, because guilty of contributory negligence, her husband cannot recover for the loss of her services consequent on such injuries.¹¹⁰ A husband and wife cannot recover for a personal injury to the wife, if the husband was guilty of contributory negligence.¹¹¹

¹⁰⁴ *Kelley v. Mayberry Tp.*, 154 Pa. St. 440, 26 Atl. 595; *Henry v. Klopfer*, 147 Pa. St. 178, 23 Atl. 337, 338.

¹⁰⁵ *Wolf v. Bauereis*, 72 Md. 481, 19 Atl. 1045.

¹⁰⁶ *Uransky v. Dry-Dock, E. B. & B. R. Co.*, 118 N. Y. 304, 23 N. E. 451; *Woolsey v. Trustees*, 61 Hun, 136, 15 N. Y. Supp. 647.

¹⁰⁷ *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260; *Chicago, B. & Q. R. Co. v. Dickson*, 67 Ill. 122; *Berger v. Jacobs*, 21 Mich. 215; *Du Bois Borough v. Baker*, 120 Pa. St. 266, 13 Atl. 783. Compare *Hyatt v. Adams*, 16 Mich. 180; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17.

¹⁰⁸ *Becker v. Janinski* (Com. Pl.) 15 N. Y. Supp. 675; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Reynolds v. Robinson*, 64 N. Y. 589; *Shaeffer v. Sheppard*, 54 Ala. 244; *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122; *Kavanaugh v. Janesville*, 24 Wis. 618; *Meese v. City of Fond du Lac*, 48 Wis. 323, 4 N. W. 406.

¹⁰⁹ *Atlanta St. R. Co. v. Jacobs*, 88 Ga. 647, 15 S. E. 825; *Metropolitan St. Ry. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49. See *Roberts v. City of Detroit*, 102 Mich. 64, 60 N. W. 450.

¹¹⁰ *Winner v. Oakland Tp.*, 158 Pa. St. 405, 27 Atl. 1110, 1111.

¹¹¹ *Pennsylvania R. Co. v. Goodenough*, 55 N. J. Law, 577, 28 Atl. 3.

CHAPTER VIII.**WRONGS AFFECTING REPUTATION.**

- 146. Defamation Defined.
- 147. Publication—Libel, Slander, and Malicious Prosecution Distinguished.
- 148. What Constitutes.
- 149. Republication.
- 150. Application to the Plaintiff.
- 151. Damage as the Gist of Libel and Slander.
- 152–153. Presumption in Action for Slander.
- 154–155. Presumption in Action for Libel.
- 156. Construction of Language Used.
- 157. Signification of Words.
- 158. Malice.
- 159. Defenses.
- 160. Common-Law Defenses.
- 161–163. Justification.
- 164. Mitigation.
- 165. Slander of Title or Property.

DEFAMATION DEFINED.

- 146. Defamation is a false publication calculated to bring into disrepute. As to its objects, it may refer to—**
- (a) Persons, when it is commonly called libel and slander; or**
 - (b) Things, when it is commonly called slander of property or title.**

Defamation is the generic name for injuries to reputation. While it is commonly called slander of title when it concerns property, still, where the words of a publication apply to property, in such a way as to injure the reputation of the owner by exposing him to hatred, contempt, or ridicule, it is a libel on such person.¹

The right of reputation is a confused one. It is sometimes regarded as an absolute or simple right, from the violation of which damage will be presumed. In many, perhaps in most, cases, the

¹ State v. Mason, 26 Or. 273, 38 Pac. 130.

right is a right not to be harmed, from the violation of which there is no presumption of damage, and no cause of action arises unless damages conforming to the legal standard can be proved.

It does not seem to be definitely settled whether the right of reputation must be respected at peril,—as is true, for example, of the right of personal security, or of freedom of locomotion.² Moreover, malice is an essential ingredient of the wrong. Accordingly, while the right to reputation is a natural, as distinguished from an acquired, one, it can scarcely be accurately called an absolute right. It is a right not to be harmed.

The right to recover for personal defamation depends upon sufficient and consistent allegation and proof that, first, words or other signs (a) capable of a disparaging meaning (b) were used in that sense (c) with reference to plaintiff; second, that such words or signs were (a) published by defendant so that (b) one third person, at least, understood the ill meaning; and, third, that damage resulted to plaintiff either (a) from presumption of law (which is more liberal to the plaintiff in libel than in slander) or (b) from proof of special damage, which has been specially averred. Historical differences, however, make it inconvenient to consider these subjects in this order.

PUBLICATION—LIBEL, SLANDER, AND MALICIOUS PROSECUTION DISTINGUISHED.

- 147. Publication of defamatory matter consists in communicating it to a third person or persons. According to the manner of publication, it is either**
- (a) Slander, which is defamation of a person by mere talk;**
 - (b) Libel, which is personal defamation by any other means, except through courts of justice; or,**
 - (c) Malicious prosecution, which is defamation through courts of justice.**

² See *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238-245, 28 N. E. 1; *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462; *Shepherd v. Whitaker*, L. R. 10 C. P. 502; *McLean v. New York Press Co.*, 64 Hun, 639, 19 N. Y. Supp. 262. And see *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504; *Loibl*

Publication—Libel and Slander.

There are many attempted definitions of libel and slander. A favorite distinction is that in slander intelligence is communicated to the sense of hearing; in libel, to the sense of sight.³ This is essentially true. Slander is, generally speaking, published by word of mouth; libel, by writing, printing, pictures, emblems, or effigies.⁴ However, gestures and signs—for example, movements of lips of dumb people—are equivalent to spoken words, and publish slander, not libel. They are, however, addressed to the sense of sight, and not to the sense of hearing. Perhaps a more vital distinction is that in slander the defamatory matter has a fugitive form; in libel it is embodied in a permanent form. In slander, production and publication are identical; in libel, its production is one thing and its publication another.

Again, slander is a wrong which cannot be committed by joint tortfeasors. Libel can. "An action for slander will not lie jointly against two. Such an action cannot be maintained, because the words of one are not the words of another. A separate action for words spoken must be prosecuted against each. Even if a husband and wife utter similar words simultaneously, they were regarded as two separate publications, and an action had to be brought against the husband alone for what he said, and against both husband and wife for her words."⁵ There is another distinction between libel and slander, which follows rather as a consequence, after it has been determined whether the wrong in a given case is to be regarded as libel or slander, than as means for determining the nature of the wrong in issue. Thus, libel is a criminal wrong, while slander at

v. Breidenbach, 78 Wis. 49, 47 N. W. 15; Stanley v. Powell [1891] 1 Q. B. 86; Holmes v. Mather, L. R. 10 Exch. 261; Fletcher v. Rylands, L. R. 1 Exch. 277, L. R. 3 H. L. 330.

³ Cooley, Torts, p. 193; Townsh. Sland. & L. c. 1.

⁴ A gallows at the door of an obnoxious person is a libel on him. Case de Libellis Famosis, 5 Coke, 125b. And see Eyre v. Garlick, 42 J. P. 68. Query: Is not Jefferies v. Duncombe, 11 East, 226 (pimp and bawdyhouse), a case of libel, not of nuisance? A placard, Kay v. Jansen, 87 Wis. 118, 58 N. W. 245. A statue, 1 Hawk. P. C. (8th Ed.) 542.

⁵ Van Horn v. Van Horn, 56 N. J. Law, 318, 28 Atl. 669-671.

common law was not, and in most places is not now, punishable as a public wrong.⁶

There is a third means of publishing defamation, viz. by courts of justice.⁷ But it can scarcely be said to be true that injury to the reputation is the only one produced by malicious prosecution. Damages, in this form of wrong, may be "to plaintiff's property or his reputation, or may arise from his being put in danger of life, limb, or liberty."

SAME—WHAT CONSTITUTES.

148. Publication consists in

- (a) **The giving out of defamatory matter by the defendant;**
- (b) **The taking in by a third person or third persons.**

The Giving Out.

No amount of malice in thought can make silence or inactivity actionable as libel and slander. Unless the defamatory matter has been given out to some third person, there can be neither actual damages nor a basis on which the law can, with any show of reason, presume damage. There is no injury to the reputation.⁸ There is, however, no magic in the number of persons to whom the intelligence is communicated. A single person,⁹ though invisible,¹⁰ is sufficient. But the communication must be to a third person.¹¹

⁶ As to "scandalum magnatum," see Townsh. Sland. & L. § 138. As to distinction between civil and criminal, see Warnock v. Mitchell, 43 Fed. 428.

⁷ Townsh. Sland. & L. VI. "An action for libel is upon all fours with an action for malicious prosecution. The latter is but an aggravated form of an action for libel, as in it the libel is sworn to before a magistrate." Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. 513.

⁸ Generally, see Pittard v. Oliver [1891] 1 Q. B. 474; Bacon v. Michigan Cent. R. Co., 55 Mich. 224, 21 N. W. 324; Young v. Clegg, 93 Ind. 371; Spaits v. Poundstone, 87 Ind. 522; Marble v. Chapin, 132 Mass. 225; Mielenz v. Quasdorf, 68 Iowa, 726, 28 N. W. 41.

⁹ Adams v. Lawson, 17 Grat. 250.

¹⁰ Desmond v. Brown, 33 Iowa, 13; Sheffill v. Van Deusen, 13 Gray, 304.

¹¹ Sheffill v. Van Deusen, 13 Gray, 304; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822; Shephard v. Whitaker, L. R. 10 C. P. 502.

Where persons mutually engage in exchange of opprobrious epithets, neither can maintain an action for slander.¹²

While an allegation that defamatory matter was "published" is a sufficient allegation that it was given out,¹³ a charge that it was "printed" has been held insufficient.¹⁴ although printing implies passing through a compositor's room and should, therefore, perhaps be held to be *prima facie* publication.¹⁵ If the libel charged be contained in a sealed letter, read only by the plaintiff, there is no giving out to a third person.¹⁶ But it is otherwise if the letter refer in libelous words to the plaintiff, and a third person to whom it is sent reads it,¹⁷ even if such person be the plaintiff's wife.¹⁸ or clerk,¹⁹ or it is read aloud to a stranger by the writer.²⁰ Indeed, a dictated typewritten letter,²¹ or a telegram sent,²² or a postal card mailed,²³ or the signing and delivery of a petition,²⁴ may necessarily involve the publication of libelous contents to third persons. The technical sense of publication is essentially different from the colloquial. Every sale of a newspaper is a fresh publication,²⁵ but a news vendor is not necessarily liable as a publisher of defamatory matter contained in what he sells.²⁶ It is no publication to show a copy

¹² *Goldberg v. Dobberton*, 46 La. Ann. 1303, 16 South. 192; *Phillips v. Jansen*, 2 Esp. 624; *Mielenz v. Quasdorf*, 68 Iowa, 726, 28 N. W. 41.

¹³ *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244; *Id.*, 61 Vt. 484, 17 Atl. 742.

¹⁴ *Sproul v. Pillsbury*, 72 Me. 20; *Prescott v. Tousey*, 50 N. Y. Super. Ct. 12.

¹⁵ *Baldwin v. Elphinston*, 2 W. Bl. 1037.

¹⁶ *Warnock v. Mitchell*, 43 Fed. 428; *Spalts v. Poundstone*, 87 Ind. 522; *Lyle v. Clason*, 1 Caines, 581; *Willard v. Mellor*, 19 Colo. 534, 36 Pac. 148.

¹⁷ *Young v. Clegg*, 98 Ind. 371; *Gough v. Goldsmith*, 44 Wis. 262; *Fowles v. Bowen*, 30 N. Y. 20.

¹⁸ *Wenman v. Ash*, 13 C. B. 836, 22 Law J. C. P. 190-192, per Maule, J.; *Schenck v. Schenck*, 20 N. J. Law, 208.

¹⁹ *Delacroix v. Thevenot* (1817) 2 Starkie, 63.

²⁰ *Snyder v. Andrews*, 6 Barb. 43.

²¹ *Pullman v. Hill* [1891] 1 Q. B. 524. Giving a letter containing matter defamatory of another to a clerk to copy, which he does, is a publication. *State v. McIntire*, 115 N. C. 769, 20 S. E. 721.

²² *Williamson v. Freer*, L. R. 9 C. P. 393.

²³ *Robinson v. Jones* (1879) L. R. 4 Ir. 391. So it is libel to send through the mail an envelope having indorsed thereon, in large letters, "Bad-Debt Collecting Agency." *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604.

²⁴ *Cotulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058. Cf. *Woods v. Wiman*, 122 N. Y. 445, 25 N. E. 919.

²⁵ See post, notes 29, 30.

²⁶ See post, notes 29, 30.

of a caricature to a person who asks to see it.²⁷ If one sends another a sealed letter containing defamatory matter, and which the latter reads aloud, he cannot recover, because the publication is his own act.²⁸ Again, the act of publishing is not the defendant's, if he does not know of it. "A newspaper is not like a fire. A man may carry it about without being bound to suppose that it is likely to do any injury."²⁹ But it would seem that a man so far acts at his peril, with respect to defamatory matter which he has originated, that if, without intention, as by inadvertence on his part, it reaches and is known to third persons, he should be held to have published it.³⁰

The Taking in by Third Persons.

The essence of publication is not the employment of means to give out the defamatory matter, but the actual communication of intelligence to third persons. This is not accomplished until such matter is understood.³¹ Therefore, when the language is foreign, it must be shown to have been comprehended.³² If not understood, the publication is not actionable.³³

SAME—REPUBLICATION.

149. Not every repetition, but every republication, gives rise to a new cause of action.

"Every repetition," it was said in *Earl of Northampton's Case*, "is a new publication, and gives rise to a new cause of action."³⁴

²⁷ *Smith v. Wood*, 3 Camp. 323; *Delacroix v. Thevenot*, 2 Starkie, 63.

²⁸ *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244.

²⁹ *Emmens v. Pottle*, 16 Q. B. Div. 354.

³⁰ 8 Harv. Law Rev. 206; *Fraser*, Torts, 85. But see *Tompson v. Dashwood*, 11 Q. B. Div. 43, 52 Law J. Q. B. 425. Cf. *Pullman v. Hill*, supra (with which it is inconsistent).

³¹ *Sullivan v. Sullivan*, 48 Ill. App. 435. See, also, *French v. Detroit Free Press Co.*, 95 Mich. 168, 54 N. W. 711; *McAllister v. Detroit Free Press*, 95 Mich. 164, 54 N. W. 710. And see *Clutterbuck v. Chaffers*, 1 Starkie, 471; *Sheffill v. Van Deusen*, 13 Gray, 304.

³² *Klene v. Ruff*, 1 Iowa, 482; *Wormouth v. Cramer*, 3 Wend. 395; *Howland v. George F. Blake Manuf'g Co.*, 156 Mass. 543, 31 N. E. 656.

³³ *Broderick v. James*, 3 Daly, 481-484.

³⁴ 12 Coke, 132-134.

So far as mere repetition is concerned, this rule has been abandoned.³⁵ But there is an important, valid, and subsisting distinction between repetition and republication. "Republication is a second or subsequent publication of the same language. Repetition is a publication of language of the same import or meaning, as the language of a previous publication. Repetition is a subsequent publication, independent and distinct from the first publication. There may be a republication of a writing, i. e. a publication of the material written upon, with the writing thereon, and there may be a repetition of the subject-matter of a writing; also, there may be a repetition of oral language (speech), but there cannot be a republication of oral language."³⁶ Therefore, if after a recovery and satisfaction for one slanderous utterance or libelous publication, the same defamatory matter is uttered or published again by the wrongdoer, this is a new injury, and another cause of action, and there may be another recovery and satisfaction from him.³⁷ But a repetition of the same article, as an issue of the newspaper subsequent to the commencement of the action, operates merely to show malice and to aggravate damages.³⁸

SAME—APPLICATION TO THE PLAINTIFF.

150. To recover for publication of defamatory words, the plaintiff must show

- (a) Their personal application to him³⁹**
- (b) In a disparaging sense.**

Personal Application.

A general charge is not sufficient. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there

³⁵ 1 Hil. Torts, 410-415; *Gilman v. Lowell*, 1 Am. Lead. Cas. 242, note.

³⁶ Townsh. Sland. & L. p. 92, § 112. And see *Woods v. Pangburn*, 75 N. Y. 495; *Rockwell v. Brown*, 36 N. Y. 207. As to repetition by third persons, see *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208.

³⁷ *Woods v. Pangburn*, 75 N. Y. 495.

³⁸ *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 47 N. W. 562; *Ellington v. Taylor*, 46 La. Ann. 371, 15 South. 499.

³⁹ *McCallum v. Lambie*, 145 Mass. 234, 13 N. E. 899, and cases collected.

is something to point to the particular individual.”⁴⁰ However, a general charge may, by evidence that a certain person was specifically referred to, be made sufficient,⁴¹ unless by its own nature it is too uncertain.⁴² But, on the other hand, such person need not be described by his own name.⁴³ He makes out his case by showing that he is, and was understood to be, the person referred to.⁴⁴

The application must be to the plaintiff's person, not to his property.⁴⁵ To be libelous against a particular person, it must concern him, not a third person, even his wife.⁴⁶ So far as pleading is concerned, it is now commonly sufficient to allege generally that the defamatory matter was published concerning the plaintiff.⁴⁷

Disparaging Sense.

A word naturally defamatory may be so used that it is neither intended nor understood to have its literal and damaging meaning, but to be harmless.⁴⁸ Thus, if one should say, “Thou art a murderer,” the words would not be actionable, if he could make it appear that the person with whom he was conversing concerning un-

⁴⁰ Willis, J., in *Eastwood v. Holmes*, 1 Fost. & F. 347-349. But cf. Lord Campbell, in *Le Fanu v. Malcomson*, 1 H. L. Cas. 636-668; *Dexter v. Harrison*, 146 Ill. 169, 34 N. E. 46.

⁴¹ *Craig v. Pueblo Press Pub. Co.*, 5 Colo. App. 208, 37 Pac. 945. And see *Boehmer v. Detroit Free Press Co.*, 94 Mich. 7, 53 N. W. 822.

⁴² As to say, “One of you three is perjured.” *Sir John Bourn's Case*, cited Cro. Eliz. 497.

⁴³ *James v. Rutlech* (1599) 4 Coke, 17b; *Dressel v. Shipman*, 57 Minn. 23, 58 N. W. 684.

⁴⁴ *Roach v. Garden* (1742) 2 Atk. 469; *O'Brien v. Clement* (1846) 15 Mees. & W. 434, 435; *Dexter v. Harrison*, 146 Ill. 169, 34 N. E. 46. Indeed, he may be described by the name of some one else, *Levi v. Milne* (1827) 4 Bing. 195; or by a fictitious name, *Rex v. Clerk* (1729) 1 Barnard. 304; or by asterisks, *Bourke v. Warren* (1826) 2 Car. & P. 307. But see *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462. See *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111. The actionable quality of the words is one thing, the application to plaintiff another. *Smith v. Coe*, 22 Minn. 276; *Petsch v. Dispatch Printing Co.*, 40 Minn. 291, 41 N. W. 1034.

⁴⁵ Ante, p. 281.

⁴⁶ *Wellman v. Sun Print. & Pub. Co.*, 66 Hun, 331, 21 N. Y. Supp. 577.

⁴⁷ *Ratcliffe v. Evans* [1892] 2 Q. B. 524; *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752; *Nelson v. Wallace*, 48 Mo. App. 193.

⁴⁸ *Van Rensselaer v. Dole*, 1 Johns. Cas. (N. Y.) 279.

lawful hunting had admitted killing several hares, and that by the expression used he meant a "murderer" of the hares so killed.⁴⁹ So one may, without responsibility in damages, denounce another as a "thief," and mean and be understood to mean no more than that the latter had been guilty of mismanagement of corporation affairs.⁵⁰

DAMAGE AS THE GIST OF LIBEL AND SLANDER.

151. Damage sometimes is of the gist of libel and slander, and sometimes is not.

The fact is that here the law is eminently artificial. It has held that certain classes of words in slander and a different class of words in libel are actionable per se; that is, invade a simple (or absolute) right of reputation. Upon proof of publication of such words, in the absence of any defense, the plaintiff must recover at least nominal damages. The law has further held that where words are not within these classes (i. e. slanderous or libelous per se), then they are actionable only on proof of special damage to the complainant. Upon proof of publication of words not per se defamatory, even in the absence of any defense, the plaintiff cannot recover, unless he shows that he suffered harm which conforms to the standard fixed by the general rules.

The consideration of this confused subject will follow this order: (1) The extent to which damage is of the gist of a cause of action in slander, and the character of such damage; (2) the extent to which damage is of the gist of a cause of action in libel; (3) cases in which damages will be presumed in libel and not in slander.

⁴⁹ Lord Cromwell's Case, 4 Coke, 13.

⁵⁰ Kidd v. Ward, 91 Iowa, 371, 59 N. W. 279; Delaney v. Kaetel, 81 Wis. 353, 51 N. W. 559; Wagner v. Saline Co. Progress Printing Co., 45 Mo. App. 6. And see Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752. But see Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443.

SAME—PRESUMPTION IN ACTION FOR SLANDER.

152. The rule in actions for slander is that words are actionable per se, and damages will be presumed by law whenever the alleged slanderous matter

- (a) Imports a charge of punishable crime;**
- (b) Imputes a contagious or offensive disease;**
- (c) Is calculated to injure the plaintiff in his calling; or**
- (d) Tends to the disherison of the plaintiff.**

153. In all other cases the words must be proved to have produced to the plaintiff some special damage, which must be, inter alia,

- (a) Sufficient in quantity;**
- (b) Pecuniary or temporal; and**
- (c) Proximate.**

Damages Presumed.

Matters which are slanderous per se are also libelous per se. Hence, when the cases of matter libelous per se, but not slanderous per se, have been duly regarded, consideration of matter defamatory per se is completed. Detailed discussion of the four classes of words in which the law presumes damage in slander is therefore postponed until the subject of the defamatory words comes up in logical order.

Special Injury—Nominal Damages.

The law will apply the maxim, "De minimis non curat lex," to the special injury or damage which a person must allege and prove to entitle him to recover for words not slanderous per se.⁵¹

Same—Pecuniary Loss.

Such damage must be pecuniary or temporal, not merely sentimental. They are allowed "whenever a person is prevented by slander from recovering that which would otherwise be conferred upon him gratuitously," as the loss of customers by a tradesman.⁵² But

⁵¹ Ante, p. 202.

⁵² *Steele v. Southwick*, 9 Johns. 214; *Bassil v. Elmore*, 65 Barb. 627, 48 N. Y. 561; *Pettibone v. Simpson*, 66 Barb. 492; *Roberts v. Roberts*, 5 Best & S. 384, 33 Law J. Q. B. 249; *Anon.*, 60 N. Y. 262 (charge of self-pollution);

generally loss of consortium vicinorum gives no ground of action.⁵³

Mere words of common abuse are not actionable without proof of special pecuniary damages, and the law has been very generous to a slanderer in its definition of common abuse. Thus, to charge prostitution, or to say of a married woman that she was "a liar and infamous wretch, and that she had all but been seduced by a notorious libertine," is not actionable without averring and proving loss of temporal advantage.⁵⁴ So, to say of a woman that the defendant "looked over the transom light and saw Mrs. P. (the plaintiff) in bed with Capt. D." was not actionable, without proving special damages; and to allege that by reason of such false statement the plaintiff was damaged in her name and fame is not sufficient to show special damages.⁵⁵ If, however, reflection on chastity result in preventing a person's marriage, damages may be recovered, but even then only when there has been special pleading.⁵⁶ The English "Slander of Woman Act" has made words imputing unchastity or adultery slanderous per se.

It has been held that a charge of adultery by a clergyman is not slanderous per se.⁵⁷ And a man may with impunity, unless such person thereby suffers special damage, call another a "blackleg,"⁵⁸ a "gambler,"⁵⁹ a "rogue,"⁶⁰ a "welcher,"⁶¹ a "low fellow."⁶²

Same—Proximate or Remote Damages.

As in all cases of tort, damages to be recoverable must be proximate not remote. But while the right to reputation was generally regarded as absolute, the courts did not extend the liberality of the

Woodbury v. Thompson, 3 N. H. 194. But see Davies v. Solomon, L. R. 7 Q. B. 112; Lynch v. Knight, 9 H. L. Cas. 599.

⁵³ Roberts v. Roberts, 5 Best & S. 384, 33 Law J. Q. B. 249.

⁵⁴ Lynch v. Knight, 9 H. L. Cas. 577-601; Weaver v. Ritter, 14 Pa. Co. Ct. R. 486.

⁵⁵ Pollard v. Lyon, 91 U. S. 225.

⁵⁶ Davis v. Gardiner, 4 Coke, 16b, pl. 11; Reston v. Pomfret, Cro. Eliz. 639; 3 Bl. Comm. 124.

⁵⁷ Parrat v. Carpenter, Cro. Eliz. 502.

⁵⁸ Barnett v. Allen, 27 Law J. Exch. 412.

⁵⁹ Forbes v. King, 1 Dowl. 672.

⁶⁰ Hopwood v. Thorn, 8 C. B. 293-313.

⁶¹ Blackman v. Bryant, 27 Law T. (N. S.) 401.

⁶² Lumby v. Allday, 1 Crompt. & J. 301.

rule as to consequences applied in trespass to slander. On the contrary, in the celebrated case of *Vicars v. Wilcocks*,⁶³ where a person spoke disparaging words of another, by reason of which the latter was dismissed from service, the damages were held to be remote. This holding is manifestly unsound.⁶⁴ True to their love for the "reasonably prudent man," the English courts incline to separate a natural and probable, from a remote, consequence, by what such a person would have foreseen as the result of a given conduct. Thus, in *Lynch v. Knight*,⁶⁵ in consequence of a charge of levity (but not incontinence), a husband turned his wife out of doors. It was held that no action lay, on the ground that the damage was not the natural result of the slander, but arose from the rashness or idiosyncrasy of her husband. "The act constituting the special damage must be such as might be expected from a reasonable man who believed the truth of the words according to the intention of the slanderer."⁶⁶

A wrongdoer is not bound to anticipate the general probability of wrongdoing by a third person. Therefore he is not bound to foresee the repetition of a libel, any more than a particular act by this or that individual.⁶⁷ But one who gives defamatory matter to a reporter is responsible for its publication in a newspaper.⁶⁸

"An action may sometimes be maintained for words written for which an action could not be maintained if they were merely spoken."⁶⁹ Libel is regarded in the law as an injury of a "greater and more aggravating nature than slander." The soundness of the distinction has been doubted.⁷⁰

⁶³ *Vicars v. Wilcocks*, 8 East, 1.

⁶⁴ *Lynch v. Knight*, 9 H. L. Cas. 577; *Moody v. Baker*, 5 Cow. 351. But see *Wallace v. Rodgers*, 156 Pa. St. 395, 27 Atl. 163.

⁶⁵ 9 H. L. Cas. 577.

⁶⁶ *Pig. Torts*, 309.

⁶⁷ *Holmes, J.*, in *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238-247, 28 N. E. 1; *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 47 N. W. 671.

⁶⁸ *State v. Osborn* (1895) 54 Kan. 473, 38 Pac. 572; *Clay v. People*, 86 Ill. 147; *Wilson v. Noonan*, 27 Wis. 598.

⁶⁹ *White v. Nicholls*, 3 How. 266; *Thorley v. Lord Kerry*, 4 Taunt. 355.

⁷⁰ *Thorley v. Lord Kerry*, 4 Taunt. 355, at page 364. And see *Deford v. Miller*, 3 Pen. & W. 103; *Colby v. Reynolds*, 6 Vt. 489; *Archbishop of Tuam v. Robeson*, 5 Bing. 17-21.

SAME—PRESUMPTION IN ACTION FOR LIBEL.

154. The rule in actions for libel is that words are actionable per se, and damages will be presumed only when the matter complained of as libelous is in its nature ordinarily calculated to

- (a) Injure the complainant in his calling;
- (b) Injure the complainant in his social relations; or,
- (c) To subject him to public scandal, scorn, ridicule, or contempt.

155. In all other cases the words must be proved to have produced special loss or injury to the plaintiff conforming to legal standards.

This is the general rule of damages applied to violence of right of reputation. Certain words are defamatory per se. What such words are is determined, not by the use of artificial or historical tests,—the “four-class test,” as in slander,—but by a reasonable and natural standard, viz. the inevitable tendency of certain classes of words to do what a man of sound common sense would call damage. Other words, which are not necessarily harmful, may become so under the circumstances of a particular case. Then the burden is on the complainant to show what loss to him was consequent on their publication.

Damages Presumed.

Whenever words are libelous per se, no proof of actual injury is necessary to entitle the plaintiff to recover something. The law presumes that he had suffered some injury by reason of the publication, and the amount of that injury or damage is a question for the jury.⁷¹ Whenever words are slanderous per se, they are also libelous per se.⁷²

⁷¹ Henkel v. Schaub, 94 Mich. 542, 54 N. W. 293; Smith v. Sun Printing & Pub. Ass'n, 5 C. C. A. 91, 55 Fed. 240; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 862; Newell, Defam. 181.

⁷² Bergmann v. Jones, 94 N. Y. 51; Mitchell v. Milholland, 106 Ill. 175; Haney Manuf'g Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073.

Words Defamatory per Se in Libel, but not in Slander.

"An action for libel may be sustained for words published which tend to bring one into public hatred, contempt, or ridicule,⁷³ even though the same words spoken would not have been actionable. And it would seem so apparent that an individual may be brought into hatred, contempt, and ridicule, within the meaning of the law, by professing vicious, degrading, absurd principles, that it can need no discussion." This was applied to a publication that a person had failed of election because he was an anarchist.⁷⁴ While it is not slanderous per se to call a woman a "bitch,"⁷⁵ or a "prostitute,"⁷⁶ a publication charging a female of previous good repute and chastity with having traveled with a married man, and with having been turned out of an hotel, and that the revelation has caused a sensation in the community where it transpired, is actionable libel.⁷⁷ It is libelous per se to write of a man that "he has turned into an enormous swine who lives on lame horses, and that he will probably remain a swine the rest of his days."⁷⁸ To write of one that he is a "swindler" is libelous,⁷⁹ but the words are not slanderous per se.⁸⁰ While slander, injuring a man merely in

⁷³ *Solverson v. Peterson*, 64 Wis. 198, 25 N. W. 14; *Tillson v. Robbins*, 68 Me. 295; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111; *Hatt v. Evening News Ass'n*, 94 Mich. 114, 53 N. W. 952; *Allen v. News Pub. Co.*, 81 Wis. 120, 50 N. W. 1093.

⁷⁴ *Cervený v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692. Cf. *Stewart v. Pierce* (Iowa) 61 N. W. 388.

⁷⁵ *Nealon v. Frisbie*, 11 Misc. Rep. 12, 31 N. Y. Supp. 856. Or hermaphrodite, *Wetherhead v. Armitage*, 2 Lev. 233. But see *Malone v. Stewart*, 15 Ohio, 319.

⁷⁶ *Douglas v. Douglas* (Idaho) 38 Pac. 934. *Corcoran v. Corcoran*, 7 Ir. C. L. 272.

⁷⁷ *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991; *McMahon v. Hallock*, 48 Hun, 617, 1 N. Y. Supp. 312.

⁷⁸ *Solverson v. Peterson*, 64 Wis. 198, 25 N. W. 14. So to call a man a "skunk," *Massuere v. Dickens*, 70 Wis. 83, 35 N. W. 349. It is not actionable to charge a town councillor with being unfit for his office. *Alexander v. Jenkins*, 1 Q. B. 797.

⁷⁹ *J'Anson v. Stuart*, 1 Term R. 748.

⁸⁰ *Savile v. Jardine*, 2 H. Bl. 532; *Chase v. Whitlock*, 3 Hill, 139; *Weil v. Altenhofen*, 26 Wis. 708; *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187, 25 Atl. 546. But see *Stern v. Katz*, 38 Wis. 136.

his social relations, without inflicting pecuniary harm, is not actionable,⁸¹ it is otherwise as to libel.⁸²

Special Injury in Libel.

In libel, as in many other causes of action, one may be able to recover by showing special injury to himself when he would be entitled to nothing in the absence of such special injury. Thus, in an action for a malicious falsehood, intentionally published in a newspaper about a person's business,—a falsehood not actionable as a personal libel and not defamatory in itself,—evidence that a general loss of business has been the direct and natural consequence of such falsehood is admissible, and, if uncontradicted, is sufficient to maintain the action.⁸³

Same—Mental Suffering.

Mental suffering alone is not such special damage as will sustain an action for defamation, where the words are not otherwise actionable.⁸⁴ But where the words are actionable per se, or other special damages have been proved, mental anxiety, grief, and loss of society resulting from libelous publication may be considered in estimating the damage.⁸⁵ And mental suffering is an element of actual damage, although malice be disproved.⁸⁶

⁸¹ Ante, p. 290.

⁸² See, generally, *Cox v. Lee*, L. R. 4 Exch. 284; *Eaton v. Johns*, 1 Dowl. (N. S.) 602; *Morgan v. Lingen*, 8 Law T. (N. S.) 800; *Churchill v. Hunt*, 2 Barn. & Ald. 685; *Jones v. Greeley*, 25 Fla. 629, 6 South. 448; *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713; *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735.

⁸³ *Ratcliffe v. Evans* [1892] 2 Q. B. 524; *Daniel v. New York News Pub. Co.*, 67 Hun, 649, 21 N. Y. Supp. 862; *Haney Manuf'g Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073.

⁸⁴ *Terwilliger v. Wands*, 17 N. Y. 54; *Allsop v. Allsop*, 5 Hurl. & N. 534; *Prime v. Eastwood*, 45 Iowa, 640. But see *Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846; *Burt v. McBain*, 29 Mich. 260; *Chesley v. Thompson*, 137 Mass. 126; *Welker v. Butler*, 15 Ill. App. 209.

⁸⁵ *Adams v. Smith*, 58 Ill. 417.

⁸⁶ *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628.

CONSTRUCTION OF LANGUAGE USED.

156. In order to determine whether a statement is defamatory—

- (a) It must be construed as to the ordinary and natural meaning without technical interpretation; if not defamatory in such meaning,—
- (b) It must be construed with reference to the special meaning, if any, in which it was understood by the persons by and to whom it was published.⁸⁷

Defamatory language is to be construed in its ordinary and popular sense.⁸⁸ The test is what the persons to whom it was published would reasonably suppose to have been intended, or did in fact understand, and not what the person publishing the defamation intended to charge.⁸⁹ The ordinary principles of construction apply. The language, for example, must be construed as a whole.⁹⁰ Therefore, a statement that a person is a “forger” is not slander, actionable per se, where such words are coupled with a charge of some specific act, which of itself does not constitute forgery.⁹¹ Words are to be construed in the light of their surroundings. Thus, the natural extravagance of terms used in the heat of passion may be intended and understood to mean much less than their normal import.⁹² Words harmless upon their face may be shown to have a libelous significance.⁹³

⁸⁷ *Capital & Counties Bank v. Henty*, 7 App. Cas. 741, 52 Law J. Q. B. 232; *Peake v. Oldham*, 1 Cowp. 275.

⁸⁸ *Cassidy v. Brooklyn Daily Eagle*, 138 N. Y. 239, 33 N. E. 1038.

⁸⁹ *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530. But see *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462.

⁹⁰ A crime may be imputed by interrogation. *Gorham v. Ives*, 2 Wend. 534.

⁹¹ *Barnes v. Crawford*, 115 N. C. 76, 20 S. E. 386; *Turrill v. Dolloway*, 17 Wend. 426; *Thomas v. Blasdale*, 147 Mass. 438, 18 N. E. 214; *Hayes v. Ball*, 72 N. Y. 418.

⁹² *Ritchie v. Stenius*, 73 Mich. 563, 41 N. W. 687.

⁹³ *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354; *Benz v. Wiedehoelt*, 83 Wis. 397, 53 N. W. 686; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862.

Function of Court and Jury.

Where the purport of the publication complained of is plain and unambiguous, the question whether it is a libel, in a civil action, is for the court.⁹⁴ On the other hand, where there is an uncertainty or ambiguity in the defamatory character of the words, the question is ordinarily for the jury, under instructions from the court.⁹⁵ But in certain jurisdictions, for example, in Missouri, the jury are the sole judges of the law as well as of facts.⁹⁶

SIGNIFICATION OF WORDS.

157. Words may be divided, in this connection, into three classes:

- (a) Those which cannot possibly bear a defamatory meaning, or innocent words;
- (b) Those that are clearly defamatory on their face, or words *per se* defamatory.⁹⁷
- (c) Those that are reasonably susceptible of a defamatory meaning as well as an innocent one, or ambiguous words.

Innocent Words.

There are some words which are not of a disparaging nature in the legal sense. Thus, to charge a man with having sued his mother-in-law in a county court imputes lawful and proper conduct, and is not libelous.⁹⁸ So to describe one as a "man Friday" is not defamatory, "for the man Friday, as we all know, was a respectable man, although a black man."⁹⁹ It is not libelous to publish of a professional man "that he has moved his office to his house

⁹⁴ *Morgan v. Halberstadt*, 9 C. C. A. 147, 60 Fed. 592.

⁹⁵ *McDonald v. Press Pub. Co.*, 55 Fed. 264, affirmed 11 C. C. A. 155, 63 Fed. 238; *Ewing v. Ainger*, 96 Mich. 587, 55 N. W. 996; *McAllister v. Detroit Free Press Co.*, 95 Mich. 164, 54 N. W. 710; *Schild v. Legler*, 82 Wis. 73, 51 N. W. 1099.

⁹⁶ *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614. But see *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358.

⁹⁷ *Pratt v. Press Co.*, 30 Minn. 41-43, 14 N. W. 62.

⁹⁸ *Cox v. Cooper*, 12 Wkly. Rep. 75.

⁹⁹ *Forbes v. King* (1833) 1 Dowl. 672, 2 Law J. (N. S.) Exch. 109.

to save expense.”¹⁰⁰ Very often, however, words apparently innocent have a double meaning,—one innocent, another defamatory. In such cases, the innuendo¹⁰¹ may be made the basis of an action by proper pleading. However, some words are not only ordinarily, but necessarily, innocent.¹⁰²

Words Defamatory per Se—Imputing a Crime.

According to the early English law, it was not slanderous to impute to another an offense, unless it was indictable, and scandalous or infamous. Therefore, to say that one had “forsworn himself” is not slanderous, because “forsworn” could not, of necessity, be held to mean that he had committed perjury.¹⁰³ So, to charge that a person was one of those “who stole deer” imputed a trespass, so that the charge was not, as it must be to be actionable, “in itself scandalous.”¹⁰⁴ In many of these cases, however, the point of decision was that the words were not used in such a sense as to impute a crime.¹⁰⁵ The modern English rule is that a charge of having committed a criminal, and not necessarily an indictable, offense is actionable per se.¹⁰⁶ Indeed, to say that a person is a “returned convict” is actionable per se; for although the words import that the punishment has been suffered, the obloquy remains.¹⁰⁷

Same—New York Rule.

In New York the spirit of the earlier English cases was adopted as the test. In *Brooker v. Coffin*¹⁰⁸ Justice Spencer laid down the following rule: “In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude,

¹⁰⁰ *Stewart v. Minnesota Tribune Co.*, 40 Minn. 101, 41 N. W. 457; *O'Connor v. Sill*, 60 Mich. 175, 27 N. W. 13 (criticism of school teacher).

¹⁰¹ Post, p. 302.

¹⁰² *Gaither v. Advertiser Co.*, 102 Ala. 458, 14 South. 788; *Cole v. Neustadter*, 22 Or. 191, 29 Pac. 550.

¹⁰³ *Holt v. Scholefield*, 6 Term R. 691. See *Ward v. Clark*, 2 Johns. 10.

¹⁰⁴ *Ogden v. Turner*, 6 Mod. 104.

¹⁰⁵ See *Van Rensselaer v. Dole*, Chase, Lead. Cas. 115.

¹⁰⁶ *Webb v. Beavan* (1883) 11 Q. B. Div. 609. *Simmons v. Mitchell*, 6 App. Cas. 156.

¹⁰⁷ *Denman*, C. J., in *Fowler v. Dowdney* (1838) 2 Moody & R. 119, 120. And see *Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921.

¹⁰⁸ 5 Johns. 188. And see *Brooks v. Harison*, 91 N. Y. 83; *Young v. Miller*, 3 Hill, 21, Chase, Lead. Cas. 111. But see *Widrig v. Oyer*, 13 Johns. 124.

or subject him to an infamous punishment, then they will be actionable in themselves." Hence, while, under the English rule, from a charge of perjury damages will be presumed,¹⁰⁰ in New York it has been held otherwise.¹¹⁰

Same—General American Rule.

The New York rule has been generally criticised and not followed in many American states.¹¹¹ The test adopted is often a confused one. Statutes in many jurisdictions have affected this portion of the law, both by definition of crime and of what words are per se defamatory. But, whatever phrase is adopted, the defamatory words must charge a crime.¹¹² It has been held not actionable per se to impute intention to commit a crime.¹¹³ Thus, while it is actionable to charge another with being a "blackmail-er,"¹¹⁴ for this is equivalent to saying that he is guilty of the crime of extortion, it is not actionable to say of another that he "is guilty of concocting a blackmail or extortion scheme," as the words charge merely a plan or purpose to extort money, which is not punishable unless an attempt is made to carry it out.¹¹⁵ Attributing want of chastity to a woman is more and more regarded as actionable per se.¹¹⁶

Same—Words Injurious to Calling.

"Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business,

¹⁰⁰ Jones v. Herne, 2 Wills. 87.

¹¹⁰ Alexander v. Alexander, 9 Wend. 141.

¹¹¹ Miller v. Parish, 8 Pick. 384.

¹¹² Disturbing religious meeting, Thomas v. Smith, 75 Hun, 573, 27 N. Y. Supp. 589. Forgery, Beneway v. Thorp, 77 Mich. 181, 43 N. W. 863. Indecent and criminal liberties, Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624. Arson, Clugston v. Garretson, 103 Cal. 441, 37 Pac. 469. "God damned thief," Gaines v. Belding, 56 Ark. 100, 19 S. W. 236. Adultery, Guth v. Lubach, 73 Wis. 131, 40 N. W. 681. See, also, Thomas v. Blasdale, 147 Mass. 438, 18 N. E. 214. Stumer v. Pitchman, 124 Ill. 250, 15 N. E. 757; Beneway v. Thorp, 77 Mich. 181, 43 N. W. 863.

¹¹³ McKee v. Ingalls, 5 Ill. 30; Fanning v. Chace, 17 R. I. 388, 22 Atl. 275.

¹¹⁴ Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345.

¹¹⁵ Mitchell v. Sharon, 8 C. C. A. 429, 59 Fed. 980.

¹¹⁶ Ransom v. McCurley, 140 Ill. 634, 31 N. E. 119. Cf. Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443. "Whore" actionable, Michelson v. Lavin,

are actionable.¹¹⁷ "We think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades of the nature and duties of which the court can take judicial notice. The only limitation of which we are aware is that it does not apply to illegal callings."¹¹⁸ The defendant may, if he can, escape by showing lawful excuse. If he shows no excuse, the law presumes damage.¹²⁰ Therefore, the rule is that, as to those callings in which credit is ordinarily essential to their successful prosecution, language which imputes to one in such calling a want of credit or responsibility is actionable per se.¹²¹ Thus, a false statement that a merchant in the habit of purchasing goods on credit was heavily indebted, and had conveyed property to his wife at half its value, is actionable per se.¹²² Words imputing insanity well illustrate the difference between responsibility in libel and slander. In slander, such words are actionable per se when spoken of one or his trade or occupation, but not otherwise, without proof of special damage;¹²³ but an imputation of insanity by any form of publication which constitutes libel is per se libelous.¹²⁴ One may, with impunity, say of a public officer, after the expira-

95 Ga. 565, 20 S. E. 292; *Reitan v. Goebel*, 33 Minn. 151, 22 N. W. 291; *Gray v. Baker*, 65 Hun, 620, 19 N. Y. Supp. 940.

¹¹⁷ *Bagley, J.*, in *Whittaker v. Bradley*, 7 Dowl. & R. 649. And, generally, see *Oruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74; *Gauvreau v. Superior Pub. Co.*, 62 Wis. 403, 22 N. W. 726; *Lumby v. Allday*, 1 Crompt. & J. 301. Charging a physician with adultery is not actionable per se. *Ayre v. Craven*, 2 Adol. & E. 2.

¹¹⁸ Per Channell, B., in *Foulger v. Newcomb*, L. R. 2 Exch. 327-330. *Miller v. David* [1874] L. R. 9 C. P. 118.

¹²⁰ *Steele v. Southwick*, 9 Johns. 214.

¹²¹ *Read v. Hudson*, 1 Ld. Raym. 610; *Sewall v. Catlin*, 3 Wend. 291; *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476. Malicious commercial report, *Lowry v. Vedder*, 40 Minn. 475, 42 N. W. 542. It has been held that it is not actionable to say of traders that they had executed a chattel mortgage. *Newbold v. Bradstreet*, 57 Md. 38. Publishing one's name in a list of "dead beats and delinquents," for circulation among business men, is libelous per se. *Nettles v. Somervell*, 6 Tex. Civ. App. 627, 25 S. W. 658. See *Canton Surgical & Dental Chair Co. v. McLain*, 82 Wis. 93, 51 N. W. 1098.

¹²² *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476.

¹²³ *Anderson, J.*, in *Moore v. Francis*, 121 N. Y. 190, 23 N. E. 1127.

¹²⁴ *Moore v. Francis*, *supra*.

tion of his term, what would be slanderous per se while he was in office.¹²⁵ Words derogatory of professional character of clergymen,¹²⁶ lawyers,¹²⁷ doctors,¹²⁸ architects,¹²⁹ actors,¹³⁰ and educators¹³¹ are actionable, without allegation or proof of special damage. But, to come within the category, the words complained of must refer to the plaintiff in his business or profession,¹³² and not charge conduct on his part which is lawful and proper.¹³³

Same—Contagious Disease.

Words which impute that one has a contagious disease, which would cause the person to be excluded from society,¹³⁴ may be actionable per se. But the imputation must be, not as having had, but as having, such disease, because it is only while the person is disordered that he is unfit for society.¹³⁵ Leprosy and the plague were such diseases.¹³⁶ An imputation of having a venereal disease,¹³⁷ as gonorrhea,¹³⁸ is actionable per se.

¹²⁵ *Forward v. Adams*, 7 Wend. 204. And see *Ratcliffe v. Evans* [1892] 2 Q. B. 524.

¹²⁶ *Piper v. Woolman*, 43 Neb. 280, 61 N. W. 588. As to charge him with drunkenness, *Hayner v. Cowden*, 27 Ohio St. 292.

¹²⁷ *Greenwood v. Cobbey*, 26 Neb. 449, 42 N. W. 413; *Mattice v. Wilcox*, 59 Hun, 620, 13 N. Y. Supp. 330; *Clark v. Anderson* (Super. Buff.) 11 N. Y. Supp. 729.

¹²⁸ *Secor v. Harris*, 18 Barb. 425; *Pratt v. Press Co.*, 30 Minn. 41, 14 N. W. 62.

¹²⁹ *Dennis v. Johnson*, 42 Minn. 301, 44 N. W. 68.

¹³⁰ *Williams v. Davenport*, 42 Minn. 393, 44 N. W. 311.

¹³¹ *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 S. W. 851.

¹³² *Keene v. Tribune Ass'n*, 76 Hun, 488, 27 N. Y. Supp. 1045. But see *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710; *Id.*, 37 Minn. 277, 34 N. W. 30; *Hanaw v. Jackson Patriot Co.*, 98 Mich. 506, 57 N. W. 734.

¹³³ *Homer v. Engelhardt*, 117 Mass. 539; *Ireland v. McGarvish*, 1 Sandf. 155.

¹³⁴ *Golderman v. Stearns*, 7 Gray, 181.

¹³⁵ *Carslake v. Mapledoram*, 2 Term R. 473; *Pike v. Van Wormer*, 5 How. Prac. 171. But see *Miller's Case*, Cro. Jac. 430. Cf. *Monks v. Monks*, 118 Ind. 238, 20 N. E. 744.

¹³⁶ *Taylor v. Perkins* (1607) Cro. Jac. 144; *Crittall v. Horner*, Hob. 385.

¹³⁷ *Golderman v. Stearns*, 7 Gray, 181; *Upton v. Upton*, 51 Hun, 184, 4 N. Y. Supp. 936 (a married woman).

¹³⁸ *Watson v. McCarthy*, 2 Kelly, 57.

Same—Words Tending to Dishonour.

If the words used tend to produce dishonour of a person, "bastard," for instance, they are actionable per se, and it is not necessary to allege and prove that in consequence he was in fact dishonoured.¹³⁹

Ambiguous Words.

The court having determined that words are not clearly innocent or per se defamatory, it is ordinarily a question of fact whether or not they were used and understood in a defamatory sense.¹⁴⁰ This ill meaning must be alleged and proved. That is to say, in the language of the pleading, the "innuendo must be laid."¹⁴¹ The innuendo is an averment by the plaintiff that words not libelous in their ordinary or obvious meaning without special application were used with a specified libelous meaning or application.¹⁴² When a given term as defined by lexicographers is innocent, but as colloquially used meant adultery, to be basis of recovery in a legal action it must be alleged and proved that it was used in the actionable sense.¹⁴³ An innuendo cannot introduce new matter or

¹³⁹ *Humphreys v. Stanfield*, Cro. Car. 469; *Pig. Torts*, 308.

¹⁴⁰ *Bailey v. Publishing Co.*, 40 Mich. 256. And see *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354; *McDonald v. Press Pub. Co.*, 55 Fed. 264, affirmed 11 C. C. A. 155, 63 Fed. 238. Whether to say of a woman that "she had a bad disease" is equivalent to charging her with having a venereal disease, or imputing to her want of chastity, is for the jury. *Upton v. Upton*, 51 Hun, 184, 4 N. Y. Supp. 936.

¹⁴¹ *Van Vechten v. Hopkins*, 5 Johns. 211; *Brettun v. Anthony*, 103 Mass. 37; *Patterson v. Wilkinson*, 55 Me. 42; *Sturtevant v. Root*, 27 N. H. 69; *Stitzell v. Reynolds*, 59 Pa. St. 488; *Harrison v. Manship*, 120 Ind. 43, 22 N. E. 85; *Vickers v. Stoneman*, 73 Mich. 419, 41 N. W. 495; *Ayres v. Toulmin*, 74 Mich. 44, 41 N. W. 855.

¹⁴² *Pol. Torts*, p. 217; *Van Vechten v. Hopkins*, 5 Johns. 211, 1 Hare & W. Lead. Cas. 138, and note; *Cosand v. Lee*, 11 Ind. App. 511, 38 N. E. 1099; *Stewart v. Minnesota Tribune Co.*, 41 Minn. 71, 42 N. W. 787. An issue can never be raised upon the truth of an innuendo. *Fry v. Bennett*, 5 Sandf. 54; *Com. v. Snelling*, 15 Pick. 321-335; *Taylor v. Kneeland*, 1 Doug. (Mich.) 67. And see *Cooper v. Greeley*, 1 Denio, 347; *Ayres v. Toulmin*, 74 Mich. 44, 41 N. W. 855.

¹⁴³ *Blakeman v. Blakeman*, 31 Minn. 396, 18 N. W. 103; *Emmerson v. Marvel*, 55 Ind. 265 ("slipped up on the blind side of her"); *Miles v. Van Horn*, 17 Ind. 245 (screwed).

enlarge the natural meaning of words, or put upon them a construction they will not bear. Its office is to define the defamatory meaning which the plaintiff sets upon the words,—to show how they came to have that meaning, and how they relate to the plaintiff.¹⁴⁴ When the words are in themselves actionable, it is not necessary to allege the innuendo.¹⁴⁵

MALICE.

158. In an ordinary action for defamation, spoken wrongfully and intentionally, without just cause or excuse, malice in law is inferred; but when, on account of the cause of publishing, it is prima facie excusable, malice in fact must be proved.¹⁴⁶

It is traditional that defamation must be false and malicious.¹⁴⁷ But malice here is used not in the common, colloquial sense, and means no more than in other branches of the law.¹⁴⁸ "Malice, in its common acceptation, means a wrongful act done intentionally, without just or reasonable cause."¹⁴⁹ Want of actual intention to vilify is no excuse for a libel.¹⁵⁰

¹⁴⁴ Price v. Conway, 134 Pa. St. 340, 19 Atl. 687; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813. See, also, Randall v. Evening News Ass'n, 79 Mich. 266, 44 N. W. 783.

¹⁴⁵ Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119; Callahan v. Ingram, 122 Mo. Sup. 355, 26 S. W. 1020.

¹⁴⁶ Bromage v. Prosser, 4 Barn. & C. 247.

¹⁴⁷ Rounds v. Delaware, L. & W. R. Co., 3 Hun, 329; McPherson v. Daniels, 10 Barn. & C. 263-266.

¹⁴⁸ Com. v. York, 9 Metc. (Mass.) 93, 104, 105; Gassett v. Gilbert, 6 Gray, 94-97; White v. Duggan, 140 Mass. 18-20, 2 N. E. 110.

¹⁴⁹ Bayley, J., in Bromage v. Prosser, 4 Barn. & C. 247. And see Stuart v. Bell [1891] 2 Q. B. 341-351; Capital & Counties Bank v. Henty, 7 App. Cas. 741-787; Marks v. Baker, 28 Minn. 162-166, 9 N. W. 678; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266.

¹⁵⁰ Curtis v. Mussey, 6 Gray, 265; Hallam v. Post Pub. Co., 55 Fed. 456; Zuckerman v. Sonnenschein, 62 Ill. 115; Mitchell v. Milholland, 106 Ill. 175; Davis v. Marxhausen, 103 Mich. 315, 61 N. W. 504.

Malice Presumed.

Where the words are in themselves defamatory, and are uttered without justification, malice is an inference of law.¹⁵¹ Thus, the law presumes that a publication charging a person with having committed a crime is malicious.¹⁵² "Malice, to a legal understanding, implies no other than willfulness. The first inquiry of a civil judicature, if the fact do not speak for itself as a *malum in se*, is to find out whether it be willfully committed. It searches not into the intention or motive, any further or otherwise than as it is the mark of a voluntary act; and having found it so, it concerns itself no more with a man's design or principle of action, but punishes without scruple what manifestly to the offender himself was a breach of the command of the legislature. The law collects the intention from the act itself. The act being in itself unlawful (wrongful), an evil intent is inferred, and needs no proof by extrinsic evidence. That mischief which a man does he is supposed to mean, and he is not permitted to put in issue a meaning abstracted from the fact. The crime consists in publishing a libel. A criminal intention in the writing is no part of the definition of the crime of libel at common law."¹⁵³

In *Conroy v. Pittsburgh Times*,¹⁵⁴ Mitchell, J., speaking of a charge libelous *per se*, and belonging to the class of qualified privilege, said: "It may be conceded that it belongs to the class of qualified privilege. In such cases it is common to say that the plaintiff must prove express malice. I apprehend, however, that the more accurate statement of the law is that in such cases there is no *prima facie* presumption of malice from publication. There must be some evidence beyond the mere fact of publication, but there is no requirement as to what the form of the evidence shall be. It may be intrinsic, from the style and tone of the article. If the com-

¹⁵¹ *White v. Nicholls*, 3 How. 266; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75.

¹⁵² *Pokrok Zapadu Pub. Co. v. Zizkovsky*, 42 Neb. 64, 60 N. W. 358; *Heyler v. New York News Co.*, 71 Hun, 4, 24 N. Y. Supp. 499; *Colby v. McGee*, 48 Ill. App. 204. See *Hupfer v. Rosenfeld*, 162 Mass. 131, 38 N. E. 197.

¹⁵³ Holt, Lib. bk. 1, c. 3, p. 55, quoted in Townsh. Sland. & L. § 92; *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867.

¹⁵⁴ 139 Pa. St. 334, 21 Atl. 154-156.

munication contains expressions which exceed the limit of privilege, such expressions are evidence of malice, and the case shall be given to the jury.’¹⁵⁵ Or it may be extrinsic, as by proof of actual malice, or that the statement is knowingly false, or that it was made without probable cause, or in any way that clearly and reasonably tends to overcome the prima facie presumption of protection under the privilege. One of such ways is by the counter presumption of innocence. ‘Probable cause that would justify such publication [charging larceny] would justify a prosecution of the alleged crime.’¹⁵⁶ * * * The natural and logical order of proof is for the defendant to show the information on which he relied for probable cause, and for the plaintiff then to meet it in rebuttal. And this is the order that seems to be indicated by Brackenridge, J., in *Gray v. Pentland*.¹⁵⁷ ‘The plaintiff may, if he chooses, either in the first instance, with a view to aggravate damages, go on to show express malice, or, after an attempt by the defendant to show probable cause, he may rebut this by proof of express malice.’ It is true that actions like the present are closely assimilated to actions for malicious prosecution, in which the plaintiff must give evidence of want of probable cause. But the later actions are founded on the want of probable cause. It is an essential element of the plaintiff’s case, while in an action for libel it is an element not of the plaintiff’s case, but of the defendant’s claim of privilege.”

Malice Which Must be Proved.

Where the occasion of publication is privileged, the onus is on the plaintiff to prove malice in fact.¹⁵⁸ Thus, where alleged slanderous words impute to one the crime of adultery, and the defendant avers that they were privileged because spoken by him in good faith to members of the family, and as a witness before a church committee, and that the words are true, and it appears from the evidence that the truth or falsity of the words was within his personal knowledge, and that they related to matters about which he could not be mistaken, he is not liable if the words were true; but, if they were false, they were not spoken in good faith, and he is liable, not-

¹⁵⁵ *Neeb v. Hope*, 111 Pa. St. 145-154, 2 Atl. 568-572.

¹⁵⁶ *Id.*

¹⁵⁷ 2 Serg. & R. 23.

¹⁵⁸ *Strode v. Clement*, 90 Va. 553, 19 S. E. 177.

withstanding the circumstances under which the words were spoken.¹⁶⁰ The existence of malice is a question for the jury.¹⁶⁰

Same—Actual Malice.

Actual malice, while essential to the plaintiff's cause of action where a question of privilege is involved, is ordinarily to be considered in connection with, not the right, but the extent of the recovery. "So a libel may be published without any intention to harm a man, and yet it would be a libel, because a libel is judged by its natural consequences. That is what makes the thing libel. If it was done without any actual ill-will, any actual malevolence, the damages would not be as much as if it were done through a mean motive, an actual hatred, personal ill-will, deliberate intent to maliciously injure another man. So the question of malice may always be taken into consideration in determining the amount of damages which should be awarded. On the other hand, some things may be taken into consideration in mitigating damages. If a party who published a libel actually in good faith, doing what he thought was right under the circumstances, acting honestly,—and a libel might be published in that way,—the jury should take that good faith into consideration in mitigating, lessening, or diminishing the damages that would be awarded, and in some cases they might consider that such good faith should go far enough to reduce the damages to a mere nominal sum."¹⁶¹ Hence, evidence as to the existence¹⁶² or absence¹⁶³ of evil motive is admissible, under the general rules of evidence as to relevancy, competency, and the like.*

¹⁵⁹ Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680; Clark v. Molyneux, 3 Q. B. 237; Jackson v. Hopperton, 12 Wkly. Rep. 913, 10 Law T. (N. S.) 529, 530.

¹⁶⁰ Childers v. San José Mercury Printing & Publishing Co., 105 Cal. 284, 38 Pac. 903. Maule, J., in Somerville v. Hawkins, 10 C. B. 583-588, 15 Jur. 450; Atwill v. Mackintosh, 120 Mass. 177. Cf. Jenour v. Delmege [1891] App. Cas. 73.

¹⁶¹ Simons v. Burnham, 102 Mich. 189, 60 N. W. 476-481. See, also, Morning Journal Ass'n v. Rutherford, 1 U. S. App. 296, 2 C. C. A. 354, 51 Fed. 513; Gott v. Pulsifer, 122 Mass. 235, 239; Warner v. Press Pub. Co., 132 N. Y. 181, 30 N. E. 393; Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701; Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238-245.

¹⁶² Byrd v. Hudson, 113 N. C. 203, 18 S. E. 209; Hintz v. Graupner, 138 Ill.

¹⁶³ See note 163 on following page.

* See note * on following page.

A repetition is admissible in evidence for the purpose of showing malice in speaking the words charged.¹⁶⁴ Attempted justification may be considered as evidence of actual malice.¹⁶⁵

DEFENSES.

159. Defenses to an action for defamation may be

- (a) Statutory, or
- (b) Common law.

Statutory Defenses.

Many statutes have been passed to alter the rule of the common law as to the ability of a person uttering a defamation to escape from liability in tort. The English statute provides that, on apology and payment into the court of a sum of money by way of amends for the injury sustained by the defamation in any public newspaper or other periodical publication, the defamer has a full defense,¹⁶⁶ which may be alternative.¹⁶⁷ The apology must be full and sufficient, printed in suitable type, and conform to the statutory requirements as to time and place of publication.¹⁶⁸ Express malice may, however, be shown by the defendant.¹⁶⁹ There is a cor-

158, 27 N. E. 935; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530; *Born v. Rosenow*, 84 Wls. 620, 54 N. W. 1089; *Beneway v. Thorp*, 77 Mich. 181, 43 N. W. 863; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119; *Frazier v. McCloskey*, 60 N. Y. 337; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74.

¹⁶³ *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020.

* Evidence of falsity is admissible to prove malice, though not in itself sufficient. *Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846. See, also, *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476; *Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000.

¹⁶⁴ *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123; *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752. See *Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119; *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710.

¹⁶⁵ *Marx v. Press Pub. Co.*, 134 N. Y. 561, 31 N. E. 918, and cases cited.

¹⁶⁶ 6 & 7 Vict. c. 96, § 2; *Chadwick v. Herapath*, 3 C. B. 885.

¹⁶⁷ *Hawkesley v. Bradshaw*, 5 Q. B. Div. 302, 49 Law J. Q. B. 333.

¹⁶⁸ *Lafone v. Smith*, 3 Hurl. & N. 735, 28 Law J. Exch. 33.

¹⁶⁹ *Barrett v. Long*, 3 H. L. Cas. 395.

responding act in Canada,¹⁷⁰ and in many of the states of the Union.¹⁷¹

SAME—COMMON-LAW DEFENSES.

160. The common-law defenses peculiar to defamation may operate by way of

(a) Justification, or

(b) Mitigation.¹⁷²

161. JUSTIFICATION—Defamation may be justified by showing either that the charge claimed to be defamatory was

(a) True, or that it was

(b) Privileged.

162. The truth of the charge is a full justification in a civil action for defamation.

Our law allows a man to speak the truth, though maliciously.¹⁷³ Hence, the truth of a charge claimed to be defamatory is a full justification to a civil action.¹⁷⁴ The justification must be as broad as the charge. Thus proof of embezzlement is not broad enough to sustain the charge of embezzlement and attempt to blow open a safe and destroy the books.¹⁷⁵ A general charge cannot be justi-

¹⁷⁰ St. 50 Vict. (Manitoba) cc. 22, 23.

¹⁷¹ Laws Mich. 1885, p. 354, § 3; *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731; Gen. Laws Minn. 1887, c. 191; Gen. Laws 1889, c. 131 (Gen. St. 1894, § 5417); *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936; *Clementson v. Minnesota Tribune Co.*, 45 Minn. 303, 47 N. W. 781; *Holston v. Boyle*, 46 Minn. 432, 49 N. W. 203.

¹⁷² *Etchison v. Pergerson*, 88 Ga. 620, 15 S. E. 680.

¹⁷³ *Bigelow*, Lead. Cas. 112, note h; *Thorley v. Lord Kerry*, 4 Taunt. 355.

¹⁷⁴ *Castle v. Houston*, 19 Kan. 417; *Press Co. v. Stewart*, 119 Pa. St. 584, 14 Atl. 51; *Perry v. Porter*, 124 Mass. 338; *Drake v. State*, 53 N. J. Law, 23, 20 Atl. 747; *Root v. King*, 7 Cow. 613, 4 Wend. 113. The rule has been changed in some states by statute. See *McLean v. Warring* (Miss.) 13 South. 236; *Wheaton v. Beecher*, 79 Mich. 443, 44 N. W. 927; *Brown v. Massachusetts Title Ins. Co.*, 151 Mass. 127, 23 N. E. 733.

¹⁷⁵ *Thompson v. Pioneer Press Co.*, 37 Minn. 285, 33 N. W. 856. A charge of

fied by the truth of the charge in a single instance.¹⁷⁶ But it is not necessary to prove the truth of all details of the charge. It is enough if defendant show the matter complained of to be substantially true,—that is, to prove the gist of the statement,—provided the details which are not justified produce no different effect on the mind of the person to whom publication is made than the actual truth would do.¹⁷⁷ Thus, to charge that certain persons are “a gang who live by card-sharking” is justified by showing that on two different occasions they had cheated at cards.¹⁷⁸ In the application of this reasonable principle there has not been entire consistency in the cases. Thus, it was properly held that to charge a woman with being a whore was not sustained by proof of her reputation as a thief.¹⁷⁹ But it was also held that the charge was not sustained by proof of bad reputation for chastity.¹⁸⁰ And courts have gone to great length in holding, for example, that the charge of a crime can be justified only by showing identity of the truth with the charge, both as to the object of the crime as well as to the wrong itself.¹⁸¹ As a matter of fact it would seem that courts have pushed to an extreme the proposition that “there can be no such thing as a half-way justification.”¹⁸² Hence, it is a rule of pleading justification that “you should use the very words

incest and pregnancy is not justified by proof of incest only. *Edwards v. Kansas City Times Co.*, 32 Fed. 813. Cf. *McNaughton v. Quay*, 102 Mich. 142, 60 N. W. 474; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624.

¹⁷⁶ *Clarkson v. Lawson* (1829) 6 Bing. 266, 587. And see *Burford v. Wible*, 32 Pa. St. 95; *Stilwell v. Barter*, 19 Wend. 487.

¹⁷⁷ *Willmet v. Harmer* (1839) 8 Car. & P. 695; *Alexander v. Northeastern Ry. Co.*, 34 Law J. Q. B. 152. Cf. *England v. Bourke*, 3 Esp. 80.

¹⁷⁸ *Reg. v. Labouchere* (1880) 14 Cox, Cr. Cas. 419.

¹⁷⁹ *Smith v. Buckecker*, 4 Rawle, 295.

¹⁸⁰ *Sunman v. Brewin*, 52 Ind. 140.

¹⁸¹ Charge of criminal intercourse with one person is not justified by proof of intercourse with another person. *Buckner v. Spaulding*, 127 Ind. 229, 26 N. E. 792; *Watters v. Smoot*, 11 Ired. 315. Charge of horse stealing is not justified by proof of hog stealing. *Dillard v. Collins*, 25 Grat. 343. So proof of a crime against nature with a cow is not justification of charge of such crime with a mare. *Andrews v. Vanduzer*, 11 Johns. 38; *Downs v. Hawley*, 112 Mass. 237; *Shigley v. Snyder*, 45 Ind. 541.

¹⁸² *Fero v. Ruscoe*, 4 N. Y. 162.

alleged to have been uttered.”¹⁸³ General belief in truth of charge is no justification.¹⁸⁴

163. Privilege of a communication may be either

- (a) **Absolute, when attaching to the position a person holds, or to the document in which it is contained, and such privilege cannot be avoided, even by proof of actual malice; or**
- (b) **Qualified (or conditional), when made with reference to public interest, or in discharge of a duty, and disattaches when malice is shown.**⁴

Absolute Privilege—Judicial.

Upon principles of public policy¹⁸⁵ already considered,¹⁸⁶ “neither party,¹⁸⁷ witness,¹⁸⁸ counsel,¹⁸⁹ judge,¹⁹⁰ nor jury¹⁹¹ can be put to answer civilly or criminally for words spoken in office.”¹⁹² The

¹⁸³ *Restell v. Steward*, 1 Charl. Cases at Chambers, 89; *Dennis v. Johnson*, 47 Minn. 56, 49 N. W. 383; *Sawyer v. Bennett*, 66 Hun, 626, 20 N. Y. Supp. 835.

¹⁸⁴ *Mason v. Mason*, 4 N. H. 110; *Van Ankin v. Westfall*, 14 Johns. 233; *Bisbey v. Shaw*, 12 N. Y. 67; *Sheahan v. Collins*, 20 Ill. 326; *Kay v. Fredrigal*, 3 Pa. St. 221; *Updegrove v. Zimmerman*, 13 Pa. St. 619; *Bodwell v. Swan*, 3 Pick. 376; *Shattuc v. McArthur*, 25 Fed. 133.

¹⁸⁵ *Royal Aquarium & S. & W. Garden Soc. v. Parkinson* [1892] 1 Q. B. 431, 442, per Lord Esher, M. R. And see *Fry, L. S.*, in *Munster v. Lamb*, 11 Q. B. Div., at pages 588 and 607.

¹⁸⁶ Ante, p. 79.

¹⁸⁷ *Hibbard, Spencer, Bartlett & Co. v. Ryan*, 46 Ill. App. 313; *Randall v. Hamilton*, 45 La. Ann. 1184, 14 South. 73; *Lilley v. Roney*, 61 Law J. Q. B. 727.

¹⁸⁸ *Seaman v. Netherclift*, 2 C. P. Div. 53; *Padmore v. Lawrence*, 11 Adol. & E. 380; *Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963; *Zuckerman v. Sonnenschein*, 62 Ill. 115. But see *White v. Carroll*, 42 N. Y. 161.

¹⁸⁹ *Hodgson v. Scarlett*, 1 Barn. & Ald. 244; *Hollis v. Meux*, 69 Cal. 625, 11 Pac. 248; *McLaughlin v. Cowley*, 127 Mass. 316; *Id.*, 131 Mass. 70.

¹⁹⁰ *Scott v. Stansfield*, L. R. 3 Exch. 220; *Miller v. Hope*, 2 Shaw, App. 134; *Lange v. Benedict*, 73 N. Y. 12; *Evarts v. Klehl*, 102 N. Y. 296, 6 N. E. 592; *Houlden v. Smith*, 19 Law J. Q. B. 170.

¹⁹¹ *Rex v. Skinner* (1772) Lofft, 55; *Rector v. Smith*, 11 Iowa, 302.

¹⁹² Per Lord Mansfield, in *Rex v. Skinner*, Lofft, 56; *Gilbert v. People*, 1 Denio, 41-43.

privilege extends to courts of all kinds,¹⁹³ except where the matter is coram non judice.¹⁹⁴ It includes all pleadings,¹⁹⁵ affidavits,¹⁹⁶ and other legal papers¹⁹⁷ involved in judicial proceedings, as well as all communications between members of the bar and their clients. The privilege avails, although the words written or spoken were written or spoken without any justification or excuse, and from personal ill-will and anger against the person defamed.¹⁹⁸ "No one is permitted to allege that what was rightly done in a judicial proceeding was done with malice."¹⁹⁹ "This privilege, however, is not a license which protects every slanderous publication or statement made in course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation; or, at least, it does not protect slanderous publication, clearly irrelevant and impertinent, voluntarily made, and which the party making it could not reasonably have supposed to be relevant."²⁰⁰

Same—Legislative.

The exemption of the state for liability for torts logically leads to the absolute privilege of legislators to speak freely in the performance and within the limits of their legislative functions.²⁰¹ Where, however, the privilege is exceeded, as where defamatory

¹⁹³ *Scott v. Stansfield*, L. R. 3 Exch. 220; *Ryalls v. Leader*, L. R. 1 Exch. 296.

¹⁹⁴ *Ante*, p. 77.

¹⁹⁵ *Ruohs v. Backer's Next Friend*, 6 Heisk. 395; *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518.

¹⁹⁶ *Murphy v. Nelson*, 94 Mich. 554, 54 N. W. 282.

¹⁹⁷ *Wyatt v. Buell*, 47 Cal. 624; *Hawk v. Evans*, 76 Iowa, 593, 598, 41 N. W. 368. But cf. *Hart v. Baxter*, 47 Mich. 198, 10 N. W. 198.

¹⁹⁸ *Per Lopes, J.*, in *Royal Aquarium & S. & W. Garden Soc. v. Parkinson* [1892] 1 Q. B. 431-451.

¹⁹⁹ *Hollis v. Meux*, 69 Cal. 625, 11 Pac. 248; *Garr v. Selden*, 4 N. Y. 91-94. But see *Hill v. Miles*, 9 N. H. 14.

²⁰⁰ *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420-423, 25 N. E. 1048; *Hastings v. Lusk*, 22 Wend. 410; *Gilbert v. People*, 1 Denio, 41; *Rice v. Coolidge*, 121 Mass. 393; *White v. Carroll*, 42 N. Y. 161; *Seaman v. Netherclift*, 1 Q. P. Div. 540.

²⁰¹ *Ex parte Wason*, L. R. 4 Q. B. 573; *Bradlaugh v. Gossett*, 12 Q. B. Div. 271-283; *Coffin v. Coffin*, 4 Mass. 1. And see *Townsh. Sland. & L.* §§ 217-219.

matter is published to the outside world, liability attaches.²⁰² And statements made by a person not under oath before a legislative committee may have only a conditional privilege.²⁰³

Same—Official Communications.

In order that laws may be best executed, there are many communications which must pass between the officials of the government and other persons. The same reasoning as to public policy which exempts from general liability for torts, and from special liability for defamation, grants absolute privilege to such matter.²⁰⁴ Thus, it is a duty of every citizen to give to his government any information he may have as to the commission of an offense against its laws. Hence, if a citizen consults a state attorney as to whether facts stated constitute a crime, he may claim a double privilege, that subsisting between the bar and the advised and that between the general government and the community.²⁰⁵ On the same principle, words concerning a city attorney that "he is unfit to hold the office of city attorney; his opinion is too easily warped for money considerations," spoken by the mayor to the city council, which has power to remove the attorney, are privileged.²⁰⁶

Qualified Privilege.

Any communication is privileged when made bona fide about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) the statement is made in protection of that interest or in the performance of that duty.²⁰⁷ They must be uttered in the honest belief that they are true.²⁰⁸ The privilege may extend even to volunteered

²⁰² *Stockdale v. Hansard*, 7 Car. & P. 731; *Wason v. Walter*, L. R. 4 Q. B. 73; *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020.

²⁰³ *Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963.

²⁰⁴ *Harrison v. Bush* (1855) 5 El. & Bl. 344. However, statements in an affidavit presented to a superintendent of schools to prevent granting teacher's license to plaintiff have only a qualified privilege. *Wieman v. Mabee*, 45 Mich. 484, 8 N. W. 71.

²⁰⁵ *Vogel v. Gruaz*, 110 U. S. 311, 4 Sup. Ct. 12; *Harrison v. Bush* (1855) 5 El. & Bl. 344; *Wieman v. Mabee*, 45 Mich. 484, 8 N. W. 71; *Van Wyck v. Aspinwall*, 17 N. Y. 190.

²⁰⁶ *Greenwood v. Cobbey*, 26 Neb. 449, 42 N. W. 413.

²⁰⁷ Cf. *Toogood v. Spyring*, 1 Crompt., M. & R. 181.

²⁰⁸ *White v. Nicholls*, 3 How. 266-286; *Marks v. Baker*, 28 Minn. 162-164, 9

information.²⁰⁹ But the standard of privilege is the standard of law, not of the individual. It depends not on what the individual may have supposed to be his interest or duty, but upon what a judge decides his interest or duty in fact to have been.

The effect of the privileged communication of this qualified description is to cast on the plaintiff the burden of showing malice on the defendant's part.²¹⁰ This is ordinarily for the jury. If one exceeds the qualified privilege, its protection to him ceases, and the ordinary rules of liability apply. This, also, is usually a question of fact for the jury.²¹¹ But the court determines what is and what is not privileged.²¹²

Same—Fair Report.

Fair reports, as distinguished from comment, are privileged, but the law is not always without doubt either as to whether the privilege be absolute or qualified, and as to what kind of report is within the privilege. The general opinion would seem to be that the privilege of fair report is qualified, not absolute.²¹³

Same—Reports of Judicial Proceedings.

"A fair account of what takes place in a court of justice is privileged. The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court, and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character, is infinitesimally small as compared with the convenience of publicity."²¹⁴ The tendency,

N. W. 678; *Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 116; *Pullman v. Hill* [1891] 1 Q. B. 524-530; *Stuart v. Bell* [1891] 2 Q. B. 341, 353; *Proctor v. Webster*, 16 Q. B. Div. 112; *Jenoure v. Delmege* [1891] App. Cas. 73. And there must have been probable cause for the belief. *Carpenter v. Bailey*, 53 N. H. 590.

²⁰⁹ *Sunderlin v. Bradstreet*, 46 N. Y. 188-191.

²¹⁰ *Strode v. Clement*, 90 Va. 553, 19 S. E. 177.

²¹¹ *Hill v. Durham House-Drainage Co.*, 79 Hun, 335, 29 N. Y. Supp. 427. See, also, *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358, 724.

²¹² *Ritchie v. Sexton*, 64 Law T. (N. S.) 210.

²¹³ *Townsh. Sland. & L.* 356; *Saunders v. Baxter*, 6 Helsk. 369. Cf. *Wason v. Walter*, L. R. 4 Q. B. 73.

²¹⁴ *Parmiter v. Coupland*, 6 Mees. & W. 105-108; *Johns v. Press Pub. Co.* (Super. N. Y.) 19 N. Y. Supp. 3.

however, has been not to extend the privilege to preliminary proceedings, because of the "tendency to pervert the public mind and to disturb the courts of justice."²¹⁵

The privilege does not attach where the publication is made the vehicle for the diffusion of immoral, blasphemous, or disgusting statements.²¹⁶ Again, if the account published is false or highly colored, or the reporter has added comments, allegations, and opinions of his own, reflecting upon the character or condition of others, then the privilege does not apply.²¹⁷

Same—Reports of Public Meetings.

The report of public meetings has been held not to be within this privilege.²¹⁸ Other authorities, however, have taken the opposite view. Thus, in *Davis v. Duncan*,²¹⁹ it was held that the conduct of persons at an election meeting might be made the subject of a fair and bona fide discussion by a writer in a public newspaper, and that unfavorable comments made upon such conduct in course of such discussion were privileged. However, a true and correct narrative of a quasi judicial meeting (as of a medical society, which expelled the plaintiff) is privileged.²²⁰

Same—Fair Comment and Criticism—Books.

No action lies if the defendant can prove that the words complained of are a fair and bona fide comment on a matter of public interest.²²¹ "One writer, in exposing the follies and errors of an-

²¹⁵ Lord Ellenborough, in *Rex v. Fisher*, 2 Camp. 563-570. Therefore, the publication by newspapers of pleadings or other proceedings in civil cases before trial has been held not privileged. *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731. But see *Kimber v. Press Ass'n* [1893] 1 Q. B. 65.

²¹⁶ *Steele v. Brannan*, L. R. 7 C. P. 261.

²¹⁷ *Godshalk v. Metzgar* (Pa. Sup.) 17 Atl. 215; *Hayes v. Press Co.*, 127 Pa. St. 642, 18 Atl. 331; *Boogher v. Knapp*, 97 Mo. 122, 11 S. W. 45; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 43 N. W. 431.

²¹⁸ *Davison v. Duncan*, 7 El. & Bl. 229; *Lewis v. Few*, 5 Johns. 1; *Purcell v. Sowler*, 2 C. P. Div. 215. Cf. *Boehmer v. Detroit Free Press Co.*, 94 Mich. 7, 53 N. W. 822.

²¹⁹ L. R. 9 C. P. 396. And cf. *Charlton v. Watton*, 6 Car. & P. 385; *Smith v. Higgins*, 16 Gray, 251.

²²⁰ *Barrows v. Bell*, 7 Gray, 301; *Allbutt v. General Council of Medical Education & Registration*, 23 Q. B. Div. 400.

²²¹ *Fraser*, Torts, 90. *Campbell v. Spottiswoode*, 3 Best & S. 769.

other, may make use of ridicule, however poignant. * * * If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press, if an action can be maintained on such principles? * * * Who would have bought the works of Sir Robert Filmer, after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind?"²²²

Same—Public Men.

That the character and capacity of public men are of general interest to the community of which the parties to a communication are members is sufficient to confer the privilege.²²³ Therefore, it was held that the character of the manager of a railroad is open to public discussion and within the rule of privileged communications, when his plans affect many interests besides those of the stockholders of the road.²²⁴ A fortiori, comment on the public conduct of a public man may be privileged. Thus, to charge a treasurer with embezzlement of public funds is privileged.²²⁵ There is, however, a strong inclination on the part of the courts to modify and limit the application of this doctrine, and they have been liberal in recognizing and construing exceptions to it. The mere publication of news is not privileged.²²⁶ And the cases have gone to great length in holding that in the publication of news, or in criticising men and things, a newspaper has no privilege or immunity not possessed by private individuals.²²⁷ Fair comment or criticism, however, is to be carefully distinguished from attacks on personal char-

²²² Lord Ellenborough, in *Carr v. Hood* (1808) 1 Camp. 355, note. *O'Connor v. Sill*, 60 Mich. 175, 27 N. W. 13; *Press Co. v. Stewart*, 119 Pa. St. 584, 14 Atl. 51.

²²³ *Gott v. Pulsifer*, 122 Mass. 235. And see *Jackson v. Pittsburgh Times*, 152 Pa. St. 406, 25 Atl. 613.

²²⁴ *Crane v. Waters*, 10 Fed. 619.

²²⁵ *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678.

²²⁶ *Mallory v. Pioneer Press Co.*, 34 Minn. 521, 26 N. W. 904; *Barnes v. Campbell*, 59 N. H. 128.

²²⁷ See, generally, *Post Pub. Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921-926; *Sheckell v. Jackson*, 10 Cush. 25; *Pratt v. Pioneer Press Co.*, 30 Minn. 41, 14 N. W. 62; *Foster v. Scripps*, 39 Mich. 376; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530-540; *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674.

acter,²²⁸ or untrue statements of fact.²²⁹ Neither of these is privileged, and the jury determines what is and what is not "fair" criticism.²³⁰

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case, the appellants, in the passages which were complained of as libelous, charged the respondent (as now appears, without foundation) with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings, in language in the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."²³¹

Same—Public Duty.

The right of school officers to give the character of a school teacher would seem to be a qualified, not an absolute, privilege; therefore,

²²⁸ MacLeod v. Wakley, 3 Car. & P. 311-313; Carr v. Hood, 1 Camp. 355, note; Campbell v. Spottiswoode, 3 Best & S. 769; Crane v. Waters, 10 Fed. 619; Hamilton v. Eno, 81 N. Y. 116; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Hay v. Reid, 85 Mich. 296, 48 N. W. 507.

²²⁹ Davis v. Shepstone, 11 App. Cas. 187. And see Gott v. Pulsifer, 122 Mass. 235.

²³⁰ Bowen, L. J., in Merivale v. Carson (1887) 20 Q. B. Div. 275.

²³¹ Davis v. Shepstone, 11 App. Cas. 187. And see Burt v. Advertiser Newspaper Co., 154 Mass. 238-242, 28 N. E. 1; Hallam v. Post Pub. Co., 55 Fed. 456, affirmed 8 C. C. A. 201, 59 Fed. 530, 541; Wheaton v. Beecher, 66 Mich. 307, 33 N. W. 503; Hamilton v. Eno, 81 N. Y. 116; Rearick v. Willcox, 81 Ill. 77; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Sillars v. Collier, 151 Mass. 50, 23 N. E. 723; Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111.

they are not liable for falsely charging a teacher with cruelty, incompetency, and neglect in the exercise of duty, if they act in good faith,²³² but criminal liability may attach on proof of actual malice.²³³ So, while communication to a governor concerning proper legislation, to influence his action, is prima facie privileged, it is not in fact privileged if it contains defamatory matter which is necessarily published to others,²³⁴—as where a pamphlet is generally circulated.²³⁵ Again, “for the sake of public justice, charges and communications which would otherwise be slanderous are protected if made bona fide in the prosecution of an inquiry into a suspected crime.”²³⁶

Same—Religious and Fraternal Organizations.

The law encourages the various members of a religious organization, who are unable to dwell together in unity, peace, and concord, to try to settle their differences without public scandal. Hence communications in trials before church tribunals are privileged. Therefore, the congregation may prefer charges against the clergyman in accordance with the usage and discipline of the church, without civil responsibility.²³⁷ And one church member may, before such tribunal, publicly charge that another had committed adultery with the plaintiff, who did not belong to that church.²³⁸ The same privilege is extended to secret societies.²³⁹

Same—Commercial Communications.

Fair reports of business standing, made up on special request,²⁴⁰ even if a copy of a libelous article be sent, are not actionable.²⁴¹

²³² Galligan v. Kelly (Sup.) 31 N. Y. Supp. 561.

²³³ Vallery v. State, 42 Neb. 123, 60 N. W. 347.

²³⁴ Coffin v. Coffin, 4 Mass. 1; Rex v. Creevey, 1 Maule & S. 273.

²³⁵ Woods v. Wiman, 122 N. Y. 445, 25 N. E. 919.

²³⁶ Padmore v. Lawrence, 11 Adol. & E. 380; Dale v. Harris, 109 Mass. 193.

Cf. Eames v. Whittaker, 123 Mass. 342; Cristman v. Cristman, 36 Ill. App. 567.

²³⁷ Piper v. Woolman, 43 Neb. 280, 61 N. W. 588.

²³⁸ Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680. And see Clark v. Molyneux, 3 Q. B. Div. 237.

²³⁹ Shurtleff v. Stevens, 51 Vt. 501; Kirkpatrick v. Eagle Lodge, 26 Kan. 384.

²⁴⁰ King v. Patterson (1887) 49 N. J. Law, 417, 9 Atl. 705 (see dissenting

²⁴¹ Howland v. George F. Blake Manuf'g Co., 156 Mass. 543, 31 N. E. 656. And see John W. Lovell Co. v. Houghton, 116 N. Y. 520, 22 N. E. 1066; Bacon v. Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181.

But if defamatory matter be inserted maliciously, the communication is not privileged.²⁴² Indeed, if the report be false and injurious, it is not privileged even if the sheet be sent to subscribers in a cipher, and understood by them only,²⁴³ but without reference to such special interest as the plaintiff as a creditor would have.²⁴⁴ And, generally, business communications between strangers, although volunteered, are privileged if made in performance of a "duty which may be supposed to exist to give advice faithfully to those who are in want of it, * * * for the sake of the general convenience of business, though with some disregard of the equally important rule of morality that a man should not speak ill, falsely, of his neighbor."²⁴⁵

Same—Communications in Confidential Relations.

A qualified privilege is recognized where the relation between two persons is intimate, socially or professionally,²⁴⁶ or arises from family connections. Thus, a letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations on her future husband, is privileged.²⁴⁷

opinions); *Locke v. Bradstreet Co.*, 22 Fed. 771; *Pollasky v. Minchener*, 81 Mich. 280, 46 N. W. 5; *Rude v. Nass*, 79 Wis. 321, 48 N. W. 555; *Howland v. George F. Blake Manuf'g Co.*, 156 Mass. 543, 31 N. E. 656; *Zuckerman v. Sonnenschein*, 62 Ill. 115; *Brown v. Vannaman*, 85 Wis. 451, 55 N. W. 183.

²⁴² *Lowry v. Vedder*, 40 Minn. 475, 42 N. W. 542; *Marks v. Baker*, 28 Minn. 162-165, 9 N. W. 678.

²⁴³ *Sunderlin v. Bradstreet*, 46 N. Y. 188.

²⁴⁴ *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358; *Pollasky v. Minchener*, 81 Mich. 280, 46 N. W. 5; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 365; *State v. Lonsdale*, 48 Wis. 348, 4 N. W. 390. But such an agency may publish, generally, the entry of a judgment against defendant without liability, unless it be a false statement and special damage result. *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354. And see *Blackham v. Pugh*, 2 C. B. 611.

²⁴⁵ *Coltman, J.*, in *Coxhead v. Richards*, 2 C. B. 569-601. A letter, written by one of two rival milk sellers, advising a shipper to sell no more milk to the other unless he had surety for his goods, was not a privileged communication. *Brown v. Vannaman*, 85 Wis. 451, 55 N. W. 183. And see *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, L. R. 4 Q. B. 262; *Klinck v. Colby*, 46 N. Y. 427; *Shurtleff v. Parker*, 130 Mass. 293. Cf. *Cooke v. Wildes*, 5 El. & Bl. 328.

²⁴⁶ *Wright v. Woodgate*, 2 Crompt., M. & R. 573; *Davis v. Reeves*, 5 Ir. Com. L. 79.

²⁴⁷ *Todd v. Hawkins*, 8 Car. & P. 88, 2 Moody & R. 20; *Cristman v. Crist-*

Such communications are "fairly warranted by any reasonable occasion or exigency, and when honestly made they are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow compass."²⁴⁸ And, generally, communications in course of business between employer and employé are privileged.²⁴⁹

Same—Master as to Servant.

A master may refuse to give a letter of recommendation to his servant when the latter leaves without committing slander,²⁵⁰ and may give his servant a character to his neighbor, who afterwards employed him, which would be otherwise actionable.²⁵¹ He may warn other servants against one whom he has discharged, and may explain his reasons.²⁵² And he may publish with impunity a blacklist of discharged employés, in absence of contrary statute.²⁵³ The privilege allows the master to tell the truth, and even to volunteer what he honestly believes to be the truth, without malice and in the honest belief that he is discharging a duty to his neighbor, provided his neighbor has employed or is about to employ such servant.²⁵⁴

man, 36 Ill. App. 567. Cf. *Count Joannes v. Bennett*, 5 Allen, 169; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75. See *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959.

²⁴⁸ *Cockayne v. Hodgkisson*, 5 Car. & P. 543, 545; *Broughton v. McGrew*, 39 Fed. 672. And see *Rude v. Nass*, 79 Wis. 321, 48 N. W. 555.

²⁴⁹ *Hill v. Durham House Drainage Co.*, 79 Hun, 335, 29 N. Y. Supp. 427. But see *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75.

²⁵⁰ *Carrol v. Bird*, 3 Esp. 201.

²⁵¹ *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774. Cf. *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91; *Child v. Affleck*, 9 Barn. & C. 403.

²⁵² *Somerville v. Hawkins*, 10 C. B. 590. And see *Fowles v. Bowen*, 30 N. Y. 20; *Dale v. Harris*, 109 Mass. 193.

²⁵³ *Missouri Pac. R. Co. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. 384. And see *Hunt v. Great Northern Ry. Co.* [1891] 2 Q. B. 189; *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 33 N. W. 181.

²⁵⁴ *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 744; *Child v. Affleck*, 9 Barn. & C. 403.

164. MITIGATION—On the same principle that whatever tends to prove malice in defamation aggravates the wrong, and entitles the plaintiff to exemplary damages, whatever negatives malice operates to mitigate damages. The jury determines whether given matter is in mitigation or aggravation of damages.

Provocation.

Provocation may mitigate damage.²⁵⁵ The law makes allowance for acts committed in the heat of sudden passion by way of mitigation of damages. But if there had been an opportunity for blood to cool, a mere provocation connected with wrong complained of cannot be shown.²⁵⁶ The defense follows the analogy of provocation as mitigating damages in assault and battery,²⁵⁷ but there does not seem to be any doctrine akin to contributory negligence, whereby the wrong is barred if the person defamed in some manner induced the publication.²⁵⁸

Common-Law Retraction.

A mere offer to retract cannot be shown in mitigation of damages, but a retraction published in good faith, even after commencement of an action for defamation, may, under some circumstances, be proved in mitigation of damages,²⁵⁹ but in mitigation only,²⁶⁰ because it negatives malice.²⁶¹ Conversely, evidence that the defamer, subsequent to the publication of the article sued on, has published another containing a letter from the defamed requesting a retraction, is admissible to show malice.²⁶²

²⁵⁵ Libels by plaintiff, connected with same subject as libels by defendant, may be shown in mitigation. *Tarpley v. Blabey*, 2 Bing. N. C. 437. *Dressel v. Shipman*, 57 Minn. 23, 58 N. W. 684.

²⁵⁶ *Quinby v. Tribune Co.*, 38 Minn. 528, 529, 38 N. W. 623; *Stewart v. Tribune Co.*, 41 Minn. 71, 42 N. W. 787.

²⁵⁷ Ante, p. 261, "Assault and Battery."

²⁵⁸ *Irvine, C.*, in *Vallery v. State*, 42 Neb. 123, 60 N. W. 347, 348.

²⁵⁹ *Turton v. New York Recorder Co.*, 144 N. Y. 144, 38 N. E. 1009; *Storey v. Wallace*, 60 Ill. 51.

²⁶⁰ *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504.

²⁶¹ *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936; *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731.

²⁶² *Thibault v. Sessions*, 101 Mich. 279, 50 N. W. 624.

Honest Belief—Rumors.

The law recognizes that anything tending to show an honest belief in the substance of the publication when made is admissible for the purpose of disproving malice and mitigating damages, though it tends to prove the truth of the charge.²⁶³ Accordingly, in an action for slander, evidence that the slander was only a repetition of a current report of long standing, by which plaintiff's general reputation has become impaired, is admissible in mitigation of damages.²⁶⁴ And, where the article contained several distinct libelous charges, a justification as to part of the charge, and not the whole, goes only in mitigation of damages, and does not warrant a verdict for the defendant.²⁶⁵ Therefore, partial truth may mitigate damages.²⁶⁶ But good faith and reasonable belief will not prevent recovery of substantial damages.²⁶⁷

So far as it may affect the culpability of the defendant, as mitigating malice, evidence that he knew, believed, and relied on²⁶⁸ general rumors to the effect of the defamatory matter would be entirely proper. Hence, such evidence is often held to be admissible.²⁶⁹ However, from the plaintiff's point of view, the extent of his suffering is not measured by defendant's moral shortcoming or personal righteousness. Hence, such evidence is perhaps as often

²⁶³ *Huson v. Dale*, 19 Mich. 17-26 (per Christianity, J.).

²⁶⁴ *Nelson v. Wallace*, 48 Mo. App. 193.

²⁶⁵ *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507.

²⁶⁶ *Sawyer v. Bennett* (Sup.) 20 N. Y. Supp. 45.

²⁶⁷ *Blocker v. Schoff*, 83 Iowa, 265, 48 N. W. 1079; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1.

²⁶⁸ *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141-143, 30 N. W. 462; *Lothrop v. Adams*, 133 Mass. 471; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Hallam v. Post Pub. Co.*, 55 Fed. 456; *Id.*, 8 C. C. A. 201, 59 Fed. 530-537. The truth of the charge, though not pleaded, is admissible to disprove malice, and in mitigation of damages, if it was known at the time of publication, but not otherwise. *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476. But see *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678.

²⁶⁹ *Van Derveer v. Sutphin*, 5 Ohio St. 293; *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *Morrison v. Press Pub. Co.* (Super. N. Y.) 14 N. Y. Supp. 131-133; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614.

disallowed.²⁷⁰ But publishing defamatory matter as a rumor,²⁷¹ or giving a specific source as authority, is no longer²⁷² a defense²⁷³ by way of justification, although it may operate to mitigate damages.²⁷⁴

Plaintiff's Character and Position.

When one claims damages on the ground of the disparagement of his character, evidence, in mitigation of damages, may be given, under proper allegation,²⁷⁵ that his character was blemished before the publication of the libel or slander.²⁷⁶ Thus, in an action for libel the defendant may prove, in mitigation of damages, that before and at the time of the publication of the libel the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that, on account of this suspicion, his relatives and friends had ceased to associate with him.²⁷⁷ Evidence of general bad reputation is admissible, in mitigation of damages; and evidence of bad reputation as to that phase of character involved in a case is competent, not to establish any facts in issue, but to explain conduct and to enable the jury better to weigh the evidence upon doubtful questions of fact bearing on the character of defendant.²⁷⁸ Therefore, bad reputation for integrity is admissible in charges of political dishonesty. "We should be loth to differentiate a want of integrity in political matters from the same failing in business or

²⁷⁰ Scott v. Sampson, 8 Q. B. Div. 491; Edwards v. San José Print. & Pub. Soc., 99 Cal. 431, 34 Pac. 128; Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. 551; Blackwell v. Landreth, 90 Va. 748, 19 S. E. 791.

²⁷¹ Republican Pub. Co. v. Miner, 3 Colo. App. 568, 34 Pac. 485; Haskins v. Lumsden, 10 Wis. 359.

²⁷² Northampton's Case, 12 Coke, 133; Davis v. Lewis, 7 Term R. 17.

²⁷³ Lewis v. Walter, 4 Barn. & Ald. 605; De Crespigny v. Wellesley, 5 Bing. 392; Tildman v. Ainslie, 10 Exch. 63; M'Pherson v. Daniels, 10 Barn. & C. 263; Watkin v. Hall, L. R. 3 Q. B. 396.

²⁷⁴ Dole v. Lyon, 10 Johns. 447.

²⁷⁵ Halley v. Gregg, 82 Iowa, 622, 48 N. W. 974.

²⁷⁶ Ball, Cas. Torts, p. 122.

²⁷⁷ Earl of Leicester v. Walter, 2 Camp. 251. Cf. Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119.

²⁷⁸ Drown v. Allen, 91 Pa. St. 393; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119. It has, however, been held that in an action of libel only the "general" reputation of plaintiff can be shown in mitigation of damages. Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624.

society.”²⁷⁹ The plaintiff’s general social and personal standing may be shown in evidence as bearing on the question of damages.²⁸⁰ And if plaintiff alleges her good character and repute, and this is denied by the defendant, the plaintiff is not required to rest upon the legal presumption as to chastity and virtue,²⁸¹ but she can properly offer proof under such allegation as part of her case.²⁸²

SLANDER OF TITLE OR PROPERTY.

165. Plaintiff can recover for disparaging words published concerning title or property whenever he shows

- (a) That the statement is false;**
- (b) That the statement is malicious in fact;**
- (c) That the statement has caused him proximate and special pecuniary injury.²⁸³**

The wrong called “slander of title” is, properly speaking, the basis of an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff’s title.²⁸⁴ No specific name has been applied to cases which rest on the same foundation, but are not the same as slander of title.²⁸⁵ Disparagement of property is clearly analogous.²⁸⁶ The old form of action

²⁷⁹ Taft, J., in *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530-537.

²⁸⁰ *Larned v. Buffinton*, 3 Mass. 546; *Klumph v. Dunn*, 66 Pa. St. 141-147; *Press Pub. Co. v. McDonald*, 11 C. C. A. 155, 63 Fed. 238; *Morey v. Morning Journal Ass’n*, 123 N. Y. 207, 25 N. E. 161; *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935. As to circulation of defendant’s newspaper in aggravation of damage, see *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628. It is competent in a slander suit to admit proof, as bearing on the question of damages, that plaintiff has a family of young children, who would be disgraced by the charge. *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123. Defendant’s reputed wealth may be shown. *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628-630.

²⁸¹ *Conroy v. Pittsburgh Times*, 139 Pa. St. 334, 21 Atl. 154.

²⁸² *Stafford v. Morning Journal Ass’n*, 142 N. Y. 598, 37 N. E. 625. And see *Peters v. Bourneau*, 22 Ill. App. 177.

²⁸³ See *Boynton v. Shaw Stocking Co.*, 146 Mass. 219, 15 N. E. 507; *Wier v. Allen*, 51 N. H. 177; *Snow v. Judson*, 38 Barb. 210.

²⁸⁴ *Tindal, J.*, in *Malachy v. Soper* (1836) 3 Bing. N. C. 871-382.

²⁸⁵ *Pig. Torts*, 381, 382.

²⁸⁶ *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9

concerns realty only; the new relates to property generally,—realty and personalty, corporeal and incorporeal,—and is brought for a false statement injurious to the owner in his right to profits. It has been insisted that it is of little consequence whether the wrong is slander, or whether it is a statement of any other nature “calculated” to produce special damage.²⁸⁷ However, on consideration of the elements of the wrong, it appears that, as to matters of practice at least, there is material difference, and that the wrongs under consideration lie halfway between libel and slander and malicious prosecution;²⁸⁸ and, in many respects, approach wrongs of fraud.²⁸⁹

Falsity of Statement.

In cases where character is at stake, the presumption is in favor of the party defamed; but there is no similar presumption in favor of a man's title, or the quality of his merchandise.²⁹⁰ Unless he shows falsehood, he shows no case to go to the jury.²⁹¹ In this action truth may be given in evidence under the general issue.²⁹²

Exch. 218. But in *Young v. Macrae*, 3 Best & S. 264–270, Blackburn, J., says: “My own impression is that where there is a written depreciation of an article, unless it is a slander actionable in itself, no allegation of special damage will make it actionable except in the case of slander of title.” Disparagement may be actionable as to copyright, patents, and the like. *Dicks v. Brooks* (1880) 15 Ch. Div. 22, 49 Law J. Ch. 812; *Thorley's Cattle-Food Co. v. Massam* (1880) 14 Ch. Div. 763; *Hendriks v. Montagu*, 17 Ch. Div. 638, 50 Law J. Ch. 456; *Singer Manuf'g Co. v. Loog*, 8 App. Cas. 15; *Meyrose v. Adams*, 12 Mo. App. 329; *Andrew v. Deshler*, 45 N. J. Law, 167. To inchoate rights under agreement: *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82. To diversion of custom by misrepresentation of rights: *Marsh v. Billings*, 7 Cush. 322. And see *Riding v. Smith*, 1 Exch. Div. 91; *Clerk & L. Torts*, 493.

²⁸⁷ *Abinger, C. B.*, in *Gutsole v. Mathers*, 1 Mees. & W. 495–500.

²⁸⁸ *Burtch v. Nickerson*, 17 Johns. 217.

²⁸⁹ *Plg. Torts*, 260, 375. “It is a special variety of deceit, which differs from the ordinary type, in that third persons, not plaintiff himself, are induced by defendant's falsehood to act in a manner which caused plaintiff's damage.” *Pol. Torts*, 260.

²⁹⁰ *Burnett v. Tak*, 45 Law T. (N. S.) 743.

²⁹¹ *Clerk & L. Torts*, 494, citing *Maule, J.*, in *Pater v. Baker*, 3 C. B., at page 869; *Steward v. Young*, L. R. 5 C. P. 122–127; *McConnell v. Ory*, 46 La. Ann. 564, 15 South. 424.

²⁹² *Kendall v. Stone*, 2 Sandf. 269.

Malice.

While the authorities are agreed that malice is essential to the plaintiff's case, they are at variance as to whether malice in law is sufficient, or whether there must be malice in fact.²⁹³ The later opinions require the plaintiff to allege, and, as a necessary part of his case, to prove, that malice in fact existed,—that is, a desire on the defendant's part to injure the plaintiff, or to benefit himself or some third person at the plaintiff's expense.²⁹⁴ Certainly, where there is an occasion of privilege, the plaintiff will be nonsuited unless he shows malice in fact.²⁹⁵ As in malicious prosecution, so in the cases under consideration, malice and want of probable cause are intimately connected. Want of reasonable cause is only evidence from which the jury may, but is not bound to, infer malice.²⁹⁶ If what a person did or said was in pursuance of a bona fide claim or color of title which he was honestly asserting, and especially if he was acting under advice of counsel, though his title proves not to have been perfect, he will not be liable for slander of title.²⁹⁷

Special Damages.

In order that the plaintiff may recover, he must both allege and show, not merely damage, but special pecuniary damage, as the natural, proximate result of the disparagement.²⁹⁸ Therefore, the mere averment that, because of the alleged wrong, the plaintiff was compelled to go out of business is insufficient.²⁹⁹ But, if one falsely

²⁹³ Young v. Macrae, 3 Best & S. 264; Johnson v. Hitchcock, 15 Johns. 185; Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R. 9 Exch. 218. And see Paull v. Halferty, 63 Pa. St. 46; Wren v. Weild, L. R. 4 Q. B. 213; Walkley v. Bostwick, 49 Mich. 374, 13 N. W. 780; Andrew v. Deshler, 45 N. J. Law, 167.

²⁹⁴ Halsey v. Brotherhood, 19 Ch. Div. 391; Hatchard v. Mege, 18 Q. B. Div. 771.

²⁹⁵ Pater v. Baker, 3 C. B. 831; Pitt v. Donovan, 1 Maule & S. 639.

²⁹⁶ Pitt v. Donovan, 1 Maule & S. 639; Pater v. Baker, 3 C. B. 868.

²⁹⁷ Hill v. Ward, 13 Ala. 310; Bailey v. Dean, 5 Barb. 297; Pitt v. Donovan, 1 Maule & S. 639; Kendall v. Stone, 5 N. Y. 14.

²⁹⁸ Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527; Chesebro v. Powers, 78 Mich. 472, 44 N. W. 290; Tobias v. Harland, 4 Wend. 537; Dooling v. Budget Pub. Co., 144 Mass. 258, 10 N. E. 809; Walton v. Perkins, 28 Minn. 413, 10 N. W. 424.

²⁹⁹ Dudley v. Briggs, 141 Mass. 582, 6 N. E. 717; Wilson v. Dubois, 35 Minn. 471, 20 N. W. 68. And see Riding v. Smith, 1 Exch. Div. 91-94 (per Kelly, C. B.).

and maliciously claims a lien on wood which another had contracted to sell, whereby the latter is unable to deliver, this is good cause of action for slander of title,³⁰⁰ However, the damage complained of must be the proximate result of the wrong. Therefore, it has been held, in New York,³⁰¹ that the breach of a contract with a third person for sale of a lot of land was insufficient to make out special damage.

³⁰⁰ Green v. Button, 2 Crompt., M. & R. 707.

³⁰¹ Kendall v. Stone, 5 N. Y. 14; Vicars v. Wilcocks, 8 East, 1.

CHAPTER IX.

MALICIOUS WRONGS.

- 166. Malicious Wrongs in General.
- 167. Deceit.
- 168. The Wrongful Conduct of Defendant.
- 169. The Fraudulent Intent.
- 170-173. The False Representation.
- 174-175. Conduct of Plaintiff.
- 176. Resulting Damage.
- 177-178. Malicious Prosecution.
- 179. The Judicial Proceeding.
- 180. Termination of Proceeding.
- 181. Parties to Proceeding.
- 182. Malice and Want of Probable Cause.
- 183. Damages.
- 184. Distinction from False Imprisonment.
- 185. Malicious Abuse of Process.
- 186. Malicious Interference with Contract.
- 187-188. Conspiracy.
- 189. Strikes and Boycotts.

MALICIOUS WRONGS IN GENERAL.

166. To do intentionally what is calculated in the ordinary course of events to damage, and which in fact does damage, another, in that other person's property or trade, is actionable, if done without just cause or excuse.¹

Certain traditional forms of malicious wrongs are clearly recognized. Discussion of such wrongs are found in texts, scattered articles, decisions, and digests. Among these may be mentioned libel and slander, slander of title, business, or property, fraud and

¹ Bowen, L. J., in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25, citing *Bromage v. Prosser*, 4 Barn. & C. 247. And see *Onesley v. King*, 74 Me. 164. Cf. *Falloon v. Schilling*, 29 Kan. 292. See ante, p. 61.

deceit, malicious prosecution, and other malicious abuse in connection with courts of justice. Beyond these conventional forms of wrongs there has been a general tendency to deny the existence of a cause of action for which the law provides sanction. The loose sayings already considered, to the effect that a bad intention cannot make lawful conduct actionable, and that a good intention cannot make unlawful conduct lawful, have led to a vague impression that these familiar forms of malicious wrongs are the only ones recognized by law, and that unless a given case be brought within them there is no cause of action. This is a radical error. It is true that for libel and slander, deceit, and malicious prosecution² the common law provided a specific form of action and a definite remedy; but under the actions on the case, even at common law, wherever there was a wrong conforming to the legal standard, the remedy was provided, in large measure at least.

DECEIT.

167. Deceit consists in leading a man into damage by willfully or recklessly causing him to believe and act on a falsehood.

167a. Whether or not deceit is actionable depends upon the legal aspect of—

- (a) The wrongful conduct of defendant. ✓
- (b) The conduct of plaintiff caused thereby. ✓
- (c) The damage resulting therefrom. ✓

SAME—THE WRONGFUL CONDUCT OF DEFENDANT.

168. The wrongfulness of defendant's conduct depends upon—

- (a) His mental attitude, and
- (b) His consequent act or omission, i. e. the false representation.

² Bigelow, Lead. Cas. 207-210; historical portion of note to *Hutchins v. Hutchins*, 7 Hill, 104.

The wrong, for which at common law trespass lay, did not depend, so far as the fact of liability is concerned, upon the mental attitude of the wrongdoer; although willfulness at the one extreme or mistake at the other might affect the extent of the recovery. Deceit, on the other hand, rests primarily upon the mental attitude. It depends distinctly upon moral shortcoming. Ordinarily, there is not only voluntary conduct; there is also voluntary injury. The law of deceit has to deal with the legal aspects of the moral question. The standard of legal fraud is practically the same as of moral fraud.⁴ The presumption of innocence applies, and the burden is on defendant to show moral or legal wrong.⁵

169. THE FRAUDULENT INTENT—False representations do not amount to a fraud at law unless they be made with a fraudulent intent. The intent to deceive may be shown in either of three ways:

- (a) That the party knew his statements to be false;
- (b) That, having no knowledge of their truth or falsity, he did not believe them to be true; or
- (c) That, having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge.⁶

The courts are generally agreed that no action can be maintained for a naked lie without intent to deceive.⁷ "It is settled law that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the faith of it,

⁴ Plg. Torts, 269; Clark, Cont. 340; Weir v. Bell, 3 Exch. Div. 238-243.

⁵ Childs v. Merrill, 66 Vt. 302, 29 Atl. 532.

⁶ Mitchell, J., in Humphrey v. Merriam, 32 Minn. 197, 198, 20 N. W. 138: "In the first there would be a knowingly false assertion as to the fact; in the second, as to his belief; and in the third, as to his knowledge of the fact. And in each case the intent to deceive would be a necessary inference. But in each case the intent to deceive must exist and must be proved." And see *Id.*, 46 Minn. 413, 49 N. W. 199.

⁷ Fenwick v. Bowling, 50 Mo. App. 516.

and to alter his position to his damage.”⁸ The intent required is to harm the plaintiff,—that is, to induce him to pursue the conduct complained of. It is not essential that it should be for the defendant’s benefit.⁹ Thus, a person making misrepresentations as to the title of lands may be liable to the purchaser, though he has no direct interest in the transaction, and receives none of the consideration.¹⁰ The difficulty, however, arises in determining when the law will find intent. The intent may be actual, when the case is clear, or it may be implied, usually by the jury.¹¹ The courts are not in harmony on the subject.

False Statement with Knowledge.

The clearest case of liability for deceit arises where a person, knowing a statement to be false, and intending to deceive, is guilty of a misrepresentation. Under such circumstances, his liability is without doubt.¹² For “‘sciens’ without ‘fraudulenter’ would be sufficient to support the action.”¹³ But an honest statement of what one believes to be the facts, without misrepresentation of the source or extent of his information, cannot be made the basis of recovery.¹⁴

False Statement without Knowledge or Belief in Truth.

“If a man having no knowledge whatever of the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit

⁸ Park, B., in *Thom v. Bigland*, 8 Exch. 731; *Mahurin v. Harding*, 28 N. H. 128. Cf. *Angell v. Loomis*, 97 Mich. 5, 55 N. W. 1008. Unless complaint alleges that representations are fraudulent, it does not state a cause of action in deceit. *Holst v. Stewart*, 154 Mass. 445, 28 N. E. 574; *Litchfield v. Hutchinson*, 117 Mass. 195.

⁹ *Foster v. Charles*, 7 Bing. 105; *Polhill v. Walter*, 3 Barn. & Adol. 123.

¹⁰ *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798.

¹¹ *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506.

¹² *Marsh v. Falker*, 40 N. Y. 562; *Holdom v. Ayer*, 110 Ill. 448; *Graham v. Hollinger*, 46 Pa. St. 55; *Tucker v. White*, 125 Mass. 344; *Schwabacker v. Riddle*, 99 Ill. 343.

¹³ Per Butler, J., in *Pasley v. Freeman*, 3 Term R. 51. See *Boyd’s Ex’r v. Brown*, 6 Pa. St. 310; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Peek v. Gurney*. L. R. 6 H. L. 377-409.

¹⁴ *Chandelor v. Lopus*, Cro. Jac. 4; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Marsh v. Falker*, 40 N. Y. 562; *Meyer v. Amidon*, 45 N. Y. 169.

to himself or to deceive a third person, he is in law guilty of fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts."¹⁵ The belief of a party, to be an excuse for a false representation, must be "a belief in the representation as made. The scienter will therefore be sufficiently established by showing that the assertion was made as of the defendant's own knowledge, and not as mere matter of opinion, with regard to facts of which he was aware that he had no such knowledge."¹⁶ Although the party making the representation may have had no knowledge of its falsity, yet he will be equally responsible if he had no belief in its truth, and made it "not caring whether it was true or false."¹⁷

False Statement without Knowledge, but with Negligence.

Where, however, there is neither knowledge of falsity nor actual intention to deceive, but a misrepresentation in fact, on which another acts to his damage, the courts of England and of this country are not in entire harmony with each other, nor with themselves, as to the rule of liability.

Same—English Rule.

The main current of English authorities is to the effect that an action for damages for deceit cannot be maintained, except upon proof that the statement made was false in fact and fraudulent in intent; in other words, actual knowledge of the falsity, or actual fraud, is essential, and mere negligence in not acquiring such knowledge or in expressing belief will not suffice,¹⁸ and an action of deceit

¹⁵ Maule, J., *Evans v. Edmonds*, 13 C. B. 777-786; *Haycraft v. Creasy*, 2 East, 92-103; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516. "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they asserted that which they knew to be untrue." Per Lord Cairns, in *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64-79; *Cole v. Cassidy*, 138 Mass. 437; *Bristol v. Braidwood*, 28 Mich. 191; *Cabot v. Christie*, 42 Vt. 121; *Bower v. Fenn*, 90 Pa. St. 359; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119.

¹⁶ Per Steele, J., in *Cabot v. Christie*, 42 Vt. 121, 126, 127; *Bennett v. Judson*, 21 N. Y. 238; *Stone v. Denny*, 4 Metc. (Mass.) 151.

¹⁷ Per Smith, J., in *Jolliffe v. Baker*, 11 Q. B. Div. 255-275; *Haycraft v. Creasy*, 2 East, 92.

¹⁸ Smith, J., in *Jolliffe v. Baker*, 11 Q. B. Div. 274; *Wilde v. Gibson*, 1 H. L. Cas. 605-633, per Lord Campbell.

will not lie in respect of a negligent, as distinguished from a fraudulent, misrepresentation.¹⁹

Same—The American Rule.

In Illinois, Chief Justice Craig, in *Schwabacker v. Riddle*,* said: "We are aware of no authority which will sanction a recovery in an action for deceit, unless a false representation has been made knowingly with intent to deceive." In Massachusetts, the rule is that there can be no recovery unless the representations were known by the defendant to be false, and were made with intent to deceive,²⁰ or were made as of the defendant's own knowledge, when he did not know them to be true.²¹ The federal courts of the United States have recognized that a positive statement as of the defendant's own knowledge, recklessly made without knowledge of its truth, is actionable if false, and it need not be alleged that the representation was fraudulently made with intention to induce the plaintiff to act.²² The general spirit of American decisions accords with this rule.²³

¹⁹ *Angus v. Clifford* [1891] 2 Ch. 449; *Derry v. Peek*, 14 App. Cas. 337.

* 99 Ill. 343-348; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691. But see *Case v. Ayers*, 65 Ill. 142.

²⁰ *Nowlan v. Cain*, 3 Allen (Mass.) 263; *Brown v. Rice's Adm'r*, 26 Grat. 467; *Peek v. Derry* (1887) 37 Ch. Div. 541; *Derry v. Peek* (1889) 14 App. Cas. 337.

²¹ *Knowlton, J.*, in *Nash v. Trust Co.*, 159 Mass. 437-440, 34 N. E. 625. And see *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551; *Goodwin v. Trust Co.*, 152 Mass. 189-202, 25 N. E. 100. Cf. rule in *Litchfield v. Hutchinson*, 117 Mass. 195.

²² *Cooper v. Schlesinger*, 111 U. S. 148-155, 4 Sup. Ct. 360; *Glasple v. Keator*, 5 C. C. A. 474, 56 Fed. 203-210; *Savage v. Stevens*, 126 Mass. 207; *McFerran v. Taylor*, 3 Cranch (U. S.) 270; *Haight v. Hayt*, 19 N. Y. 464; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691.

²³ *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. 473; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Ross v. Hobson* (Ind. Sup.) 26 N. E. 775; *Hexter v. Bast*, 125 Pa. St. 52, 17 Atl. 252; *Griswold v. Gebble*, 126 Pa. St. 353, 17 Atl. 673; *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497; *Angell v. Loomis*, 97 Mich. 5, 55 N. W. 1008; *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119; *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360; *Litchfield v. Hutchinson*, 117 Mass. 195-198; *Savage v. Stevens*, 126 Mass. 207.

170. THE FALSE REPRESENTATION—The false representation may be either—

- (a) Expressed, or
- (b) Implied.

Express Misrepresentation.

The simplest case of deceit is that of express statements by one person to another, false in themselves, made knowingly, with intent to deceive, in reliance on which the latter acts to his damage.²⁴ Among the principal questions which arise in this connection is the construction of the words of the misrepresentation. The proper construction is not necessarily the literal one. "If a person makes a representation of that which is true, if he intend that the party to whom the representation is made should not believe it to be true, that is a false representation."²⁵ Moreover, an express statement may involve an actionable concealment. "Suppose you state a thing partially, you make as false a statement as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you may make a false statement. For instance, if, pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement."²⁶ The courts, if there is sufficient evidence of misrepresentation, incline to submit the import of the statement for determination by the jury.²⁷ The test of express misrepresentation is not what the defendant in his own mind intended, but what any one might reasonably suppose to be the meaning of the words used.²⁸ Where the representation of that which is true creates an obvious impression which is false, as to one who seeks to profit by the misrepresentation he has thus produced, it is a case of false representation.²⁹

²⁴ *McGibbons v. Wilder*, 78 Iowa, 531, 43 N. W. 520. See, also, *McClellan v. Scott*, 24 Wis. 81; *Chrysler v. Canaday*, 90 N. Y. 272; *Eaton v. Winnie*, 20 Mich. 165, 166; *Stewart v. Stearns*, 63 N. H. 99.

²⁵ Per Alderson, B., in *Moens v. Heyworth*, 10 Mees. & W. 147-158.

²⁶ Per James, L. J., in *Arkwright v. Newbold*, 17 Ch. Div. 301, 318. Cf. *Wachsmuth v. Martini*, 154 Ill. 515, 39 N. E. 129.

²⁷ *Powers v. Fowler*, 157 Mass. 318, 32 N. E. 166.

²⁸ *Cotton, L. J.*, in *Arkwright v. Newbold*, 17 Ch. Div. 301-322.

²⁹ *Lomerson v. Johnston*, 47 N. J. Eq. 312, 20 Atl. 675.

Implied Misrepresentation.

Representations may be implied from conduct. If one conducts himself in a particular way, with the object of fraudulently inducing another to believe in the existence of a certain state of things, and to act upon the basis of its existence, and damage resulted therefrom to the party misled, he who misled him will be just as liable as if he had misrepresented the facts in express terms.

171. A false representation may consist in either or both—

- (a) The assertion of a falsehood, or**
- (b) The suppression of the truth.**

When a falsehood has been asserted, deceit is manifestly made out. But conduct may fall far short of the assertion of a falsehood, and still be actionable as fraudulent. Thus, fraud may be perpetrated by encouraging and taking advantage of a delusion known to exist in the minds of others.³⁰

A misrepresentation does not consist in words alone, but may grow out of the act of concealment of a material fact.³¹ Thus, it was held that deceit lay where the vendor of a house, knowing of a defect in a wall, plastered it up and papered it over.³²

Suppression of truth, where there is a duty to speak, is as much a legal wrong as a positive falsehood.³³ Therefore concealment, by the owner of a business enterprise, of a decline in its profits between the date of his agreement to sell and the signing of the contract of sale, is actionable when the purchaser has no opportunity to discover the decline, and has agreed to buy on the faith of representations as to the prior rate of profit, having told the seller that

³⁰ *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940.

³¹ *Chisolm v. Gadsden*, 1 Strob. (S. C.) 220; *Lobdell v. Baker*, 1 Metc. (Mass.) 193. And see *Tryon v. Whitmarsh*, 1 Metc. (Mass.) 1; *Coles v. Kennedy*, 81 Iowa, 360, 46 N. W. 1088; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551.

³² Cited in *Pickering v. Dawson* (1813) 4 Taunt. 779; *Schneider v. Heath* (1813) 3 Camp. 506: "If I sell a horse which has lost an eye, no action lies; but otherwise if I sell him with a counterfeit eye." *Southerne v. Howe*, 2 Rolle, 5. And see *Hill v. Gray*, 1 Starkie, 434.

³³ *Allen v. Addington*, 7 Wend. 9; *Anon.* (1876) 67 N. Y. 598; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050; *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 9 Sup. Ct. 101. As to when there is a duty to

he would not buy if there had been a decline.³⁴ If, however, there be no duty to disclose, failure to tell the truth is not actionable fraud.³⁵ Thus deceit does not lie for leasing a house required for immediate occupation without disclosing that it is in a ruinous condition.³⁶

172. An action for fraud or deceit does not lie where the representation complained of consists merely in

- (a) **An expression of opinion;**
- (b) **A representation of law;**
- (c) **A promise or representation as to future events.**

Expression of Opinion.

Statements which purport to be mere opinion, as distinguished from statements of facts, cannot be made the foundation of recovery.³⁷ "The misrepresentation must relate to alleged facts, or to the condition of things as then existent. * * * It must be as to matters of fact substantially affecting his (the aggrieved party's) interest, not as to matters of opinion, judgment, probability, or expectation. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment

✓
speak, on pain of being guilty of fraud by reason of silence, see *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718; *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421; *Kidney v. Stoddard*, 7 Metc. (Mass.) 252.

³⁴ *Loewer v. Harris*, 6 C. C. A. 394, 57 Fed. 368. And see *French v. Vining*, 102 Mass. 132. Cf. *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. 426.

³⁵ See Lord Cairns, in *Peek v. Gurney*, L. R. 6 H. L. 377.

³⁶ *Keates v. Earl of Cadogan* (1851) 10 C. B. 591. Cf. *Smith v. Marrable*, 11 Mees. & W. 5; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161. Cf. *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126. So, if defendant sell diseased pigs, under agreement that they should be taken "with all faults," no action lies for failure to disclose condition. *Ward v. Hobbs*, 4 App. Cas. 14.

³⁷ *Derry v. Peek*, 14 App. Cas. 337; *Holbrook v. Connor*, 60 Me. 578; *Fulton v. Hood*, 34 Pa. St. 365; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Tuck v. Downing*, 76 Ill. 71; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161; *Nash v. Minnesota Title Ins. & Trust Co.*, 159 Mass. 437, 34 N. E. 625; *Southern Development Co. v. Silva*, 125 U. S. 249, 8 Sup. Ct. 881; *Scroggin v. Wood*, 87 Iowa, 497, 54 N. W. 437 (that a stallion would not produce sorrel colts). Cf. *Peak v. Frost*, 162 Mass. 298, 38 N. E. 518.

may be unsound; the expected contingency may never happen; the expectation may fail."³⁸ Thus, the phrase "worth so much" is a mere expression of an opinion;³⁹ but to say that defendant "gave so much for" specified property has been held to represent a fact.⁴⁰ So, to represent what dividends certain stock would pay in the future is to express an opinion,⁴¹ but to represent that stock had paid a specified rate of dividend at prior times is to state a fact.⁴²

However, in some cases an opinion is regarded as substantially a fact, for the misrepresentation of which an action for deceit will lie. Thus, a misrepresentation that "the parties were good" creates liability in deceit on the part of persons making such statement, if they are not parties to the contract.⁴³ Indeed, perhaps the true view of the law is that an expression of an opinion not honestly entertained, and intended to be acted upon, cannot, in many cases, be regarded otherwise than as a fraud.⁴⁴ The proper view of these cases is that there is an exception as between vendor and vendee.⁴⁵ Exaggerated praise is not actionable.⁴⁶ Hence, statements as to value,⁴⁷ and "those vague commendations of wares which manifestly are open to

³⁸ Appleton, C. J., in *Long v. Woodman*, 58 Me. 49.

³⁹ *Harvey v. Young* (1602) 1 Yel. 21a.

⁴⁰ *Lindsay Petroleum Co. v. Hurd* (1874) L. R. 5 P. C. 243. And see *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858; *Smith v. Carlson*, 36 Minn. 220, 30 N. W. 761; *Sandford v. Handy*, 23 Wend. 260; *Ekins v. Tresham*, 1 Lev. 102; *Dobell v. Stevens*, 3 Barn & C. 623.

⁴¹ *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119.

⁴² *Handy v. Waldron*, 18 R. I. 567, 29 Atl. 143.

⁴³ *Pasley v. Freeman*, 3 Term R. 51; *Belcher v. Costello*, 122 Mass. 189; *Medbury v. Watson*, 6 Metc. (Mass.) 246; *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360. And see *Marsh v. Falker*, 40 N. Y. 562; *Percival v. Harres*, 142 Pa. St. 369, 21 Atl. 876; *Hickey v. Morrell*, 102 N. Y. 454-463, 7 N. E. 321.

⁴⁴ *Anderson v. Pacific Fire & Marine Ins. Co.*, L. R. 7 C. P. 65, 69; *Peek v. Gurney*, L. R. 6 H. L. 377; *Coon v. Atwell*, 46 N. H. 510. Cf. *Edgington v. Fitzmaurice*, 29 Ch. Div. 459; *Chase v. Boughton*, 93 Mich. 285, 54 N. W. 44; *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338.

⁴⁵ Clerk & L. Torts, 393.

⁴⁶ *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244. In other words, a certain amount of "puffing" is allowed. *Directors of Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99.

⁴⁷ *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367. Cf. *Baum v. Holton*, 4 Colo. App. 406, 36 Pac. 154.

difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which it has always been understood the world over that such statements are to be distrusted," are not actionable.⁴⁸ But where land is given by the owner in trade with a person located far away from such land, who accepts it as described by the owner, without examining it, such person may recover for intentional misrepresentations made by the owner as to the condition and value of the land.⁴⁹

Representations of Law.

A misrepresentation of law is not considered as amounting to fraud, because, as it is generally said, all persons are presumed to know the law; and it might perhaps be added that such a statement would rather be the expression of an opinion than the assertion of a fact.⁵⁰ Therefore the representations by the agent of a corporation that its stock is not assessable beyond a certain per cent. of its value constitutes no defense to an action, against holders of the stock, to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representations.⁵¹ The line of distinction, however, ✓ between a statement of a fact and a statement of law, is often indistinct. "There is not a single fact connected with personal status that does not more or less involve a question of law. * * * It is not less a fact because that fact involves some knowledge or relation of law."⁵² Ignorance of the law signifies ignorance of the laws

⁴⁸ Holmes, J., in *Deming v. Darling*, 148 Mass. 504, 505, 20 N. E. 107; *Harvey v. Young*, Yel. 21a; *Gordon v. Parmelee*, 2 Allen (Mass.) 214; *Brown v. Leach*, 107 Mass. 367; *Chandelor v. Lopus*, Cro. Jac. 4; *Picard v. McCormick*, 11 Mich. 73.

⁴⁹ *Stevens v. Allen*, 51 Kan. 144, 32 Pac. 922; *Henderson v. Henshall*, 4 C. C. A. 357, 54 Fed. 320; *Smith v. Richards*, 13 Pet. (U. S.) 26; *McClellan v. Scott*, 24 Wis. 84.

⁵⁰ 2 Pom. Eq. Jur. 877. And see *Bank of U. S. v. Daniel*, 12 Pet. 32; *Fish v. Cleland*, 33 Ill. 238; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; *Gormely v. Gymnastic Ass'n of South Side*, 55 Wis. 350, 13 N. W. 242.

⁵¹ *Upton v. Tribilcock*, 91 U. S. 45.

⁵² *Jessel, M. R., in Eaglesfield v. Londonderry* (1876) 4 Ch. Div. 693-703. And see *Westervelt v. Demarest*, 46 N. J. Law, 37; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161.

of one's own country.⁵³ Ignorance of the laws of a foreign government is ignorance of fact.⁵⁴ Therefore an immigrant just arrived, meeting an old citizen, who professes familiarity with the law of land titles of the country, may successfully complain of a misrepresentation as to the title of land.⁵⁵

Promise.

A malicious representation or concealment must be of an existent fact.⁵⁶ An actionable misrepresentation must relate to a present or past state of facts, and an action of deceit does not lie for failure on the part of a promisor to perform a promise made by him to do something in the future, which he does not intend to do, and subsequently refuses to do, although the promisee has so altered his position, in reliance on such promise, that he is thereby damaged.⁵⁷ Therefore, where a vendee of goods promises to give a good and sufficient bond to reconvey,⁵⁸ or to indorse the note of another if the vendor would sell him the goods,⁵⁹ or to deliver possession of premises at a future day,⁶⁰ the vendor cannot recover upon the vendee's failure to perform his promise, notwithstanding his damage, and the vendee's fraudulent intention.⁶¹

⁵³ *Storrs v. Barker*, 6 Johns. Ch. 166-169.

⁵⁴ *Haven v. Foster*, 9 Pick. (Mass.) 112-130.

⁵⁵ *Moreland v. Atchison*, 19 Tex. 303.

⁵⁶ *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Mooney v. Miller*, 102 Mass. 217; *Morrison v. Koch*, 32 Wis. 254; *Patterson v. Wright*, 64 Wis. 289-291, 25 N. W. 10; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313; *Gage v. Lewis*, 68 Ill. 604; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153.

⁵⁷ *Fenwick v. Grimes*, 5 Cranch, C. C. 439, Fed. Cas. No. 4,733; *Dawe v. Morris*, 149 Mass. 191, 21 N. E. 313; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.

⁵⁸ *Long v. Woodman*, 58 Me. 49. See, also, *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544; *Jackson v. Allen*, 120 Mass. 64, 79.

⁵⁹ *Gallager v. Brunell*, 6 Cow. 347; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161.

⁶⁰ *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161.

⁶¹ And see *Gage v. Lewis*, 68 Ill. 604; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313; *Sawyer v. Prickett*, 19 Wall. (U. S.) 146-160; *Banque Franco-Egyptienne v. Brown*, 34 Fed. 192. A purchase of goods with an intention never to pay for them is fraudulent, though no representations are made. *Burrill v. Stevens*, 73 Me. 395.

173. In an action for deceit, it is immaterial whether the false representation was made to the plaintiff, or to some other person,⁶² provided there was an intention, express or implied, of inducing the plaintiff to act with respect—

- (a) To himself, without reference to other specific persons;**
- (b) To other specific persons;**
- (c) To the person making the statement.⁶³**

In the commonest case of false representation, the expression or suppression of the truth is made directly to the plaintiff, in person. But "every man must be held liable for the consequences of a false representation made by him to another, upon which a third person acts and by so acting is injured or damnified, provided it appears that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. But, to bring it within the principle, the injury, I apprehend, must be the immediate, and not the remote, consequence of the representation thus made." *

Inducing Acts on Plaintiff's Behalf.

A false representation may be actionable, though not made to induce the person injured to act with respect to the person making the representation, or any other specified persons. Nor need it be made to the injured party. It is sufficient if the natural and probable effect of the false representation is to induce some one to act upon it to his damage. The representation may amount to no more than negligence.⁶⁴

⁶² When made to plaintiff's agent, they are made to plaintiff. *Culliford v. Gadd* (Super. N. Y.) 17 N. Y. Supp. 457, 18 N. Y. Supp. 208.

⁶³ *Pig. Torts*, 254.

* *Barry v. Croskey*, 2 Johns. & H. 1.

⁶⁴ *Barry v. Croskey*, 2 Johns. & H. 1. And see *Medbury v. Watson*, 6 Metc. (Mass.) 246. Use by defendant of a trade-name, in fraud of plaintiff, to his damage, is actionable. *Sykes v. Sykes*, 3 Barn. & C. 541. A false representation to a state corporation commissioner as to the paid-up capital stock of the corporation will not support an action by persons who invested in the stock on the faith of it, since such statements are not intended for the public. *Hunnewell v. Duxbury*, 154 Mass. 286. 28 N. E. 267.

Thus, if one sell a gun, representing that it was safe, and the vendee's son is injured by its explosion, he can recover damages therefor.⁶⁵ So, if a letter containing false representations as to facts in connection with property (as mortgage bonds to be sold), induce not merely the person to whom it is addressed, but also other persons to whom it was shown, to invest, such representations are actionable.⁶⁶ But such liability would not extend to those who afterwards bought of such purchasers, since the letter was not intended to aid the first purchasers in selling to others.⁶⁷

The principle seems to be that a representation, whatever be its nature, cannot be supposed to continue forever, but that there is a reasonable time within which the plaintiff must act upon it, and a reasonable limitation to be placed upon the successive classes of persons who act upon it, so as to be able to rely upon the fraud.⁶⁸

Advertisements made to the public generally, as a false statement in a time-table as to the running of trains,⁶⁹ or to certain classes of the public, as a false advertisement of a farm to let by one who had not power to let,⁷⁰ are actionable.

Inducing Acts with Respect to Other Specified Persons.

The usual form in which the wrong arises from inducing another person to act to his damage with respect to other specified persons is in obtaining credit for a third party. Thus, in *Pasley v. Freeman*,⁷¹ the defendant affirmed to the plaintiff that a certain third person might be safely trusted and given credit. This statement was made falsely, deceitfully, and fraudulently, as the defendant

⁶⁵ *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337. In *George v. Skivington*, L. R. 5 Exch. 1, the wife of a vendee was injured by using a bottle of hair wash. Baron Cleasby said: "Substitute the word 'negligence' for 'fraud,' and the analogy of *Langridge v. Levy* and this case is complete." See, also, *French v. Vining*, 102 Mass. 132.

⁶⁶ *Windram v. French*, 151 Mass. 547, 24 N. E. 914; *Peek v. Gurney*, L. R. 6 H. L. 377. But see *Bedford v. Bagshaw*, 4 Hurl. & N. 538.

⁶⁷ *Nash v. Trust Co.*, 159 Mass. 437, 34 N. E. 625.

⁶⁸ *Peek v. Gurney*, L. R. 6 H. L. 377; *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938.

⁶⁹ *Denton v. Great Northern Ry. Co.*, 5 El. & Bl. 860.

⁷⁰ *Richardson v. Silvester*, L. R. 9 Q. B. 34.

⁷¹ *Pasley v. Freeman*, 3 Term R. 54. See Lord Bramwell, in *Derry v. Peek*, 14 App. Cas. 337.

knew nothing about such person. In reliance thereon, the goods were sold, and the plaintiff brought his action for damages. The defendant could not have been held liable on a guaranty, because his representations were not in writing, as required by the statute of frauds. It was held, however, that the action for deceit lay. Lord Tenterden's act⁷² was passed to cover devices thus "dexterously intended to avoid the statute of frauds."⁷³ Actions, however, for misrepresentation as to the financial responsibility of another, are generally recognized.⁷⁴

Inducing Acts with Respect to the Party Making the Statement.

When the false statement results in inducing one to do acts relative to the person making the statement, the result is nearly always a contract between the parties. Thus, in the leading case of *Chandelor v. Lopus*,⁷⁵ the defendant sold to the plaintiff a stone which he affirmed to be Bezoar stone, but which proved not to be so. It was held that no action lay against him, unless he either knew that it was not a Bezoar stone, or had warranted it to be a Bezoar stone.⁷⁶ The true principle would seem to be that whenever a representation amounts to a warranty of fact stated, and is untrue, it is fraudulent in law, whether there was knowledge, or want of knowledge, of its untruth on the part of the person making it.

Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other, and where they are not made for the purpose of preventing inquiry or examination, do not amount to a warranty of the knowledge of their truth on the part of the person making them.⁷⁷

Another illustration of cases in which the false statements have induced acts with respect to the person making the statement occurs in the cases in which merchants make false representations as to their financial responsibility to mercantile agencies. If, in

⁷² 9 Geo. IV. c. 14, § 6.

⁷³ Gibbs, C. J., in *Ashlin v. White*, Holt, N. P. 387.

⁷⁴ *Nevada Bank of San Francisco v. Portland Nat. Bank*, 59 Fed. 338; *Haycraft v. Creasy*, 2 East, 92.

⁷⁵ Cro. Jac. 4.

⁷⁶ Cf. Parker, C. J., in *Bradford v. Manly* (1816) 13 Mass. 139.

⁷⁷ Ball, Torts & Cont. 134; *Ballie v. Merrill*, 1 Rolle, 275.

reliance upon such representations, other merchants, subscribers to the agency, have been induced to make contracts, the fraud is actionable.⁷⁸

SAME—CONDUCT OF PLAINTIFF.

174. A false representation is not the cause of the damage claimed, and is therefore not actionable, unless—

(a) It actually operated to deceive; and

(b) It was relied on, although not exclusively.

175. Plaintiff's contributory negligence, or credulity, in relying on a false representation, is ordinarily no defense to the fraud.

Connection as Cause.

Fraud or deceit is an instrument by which one person injures another. If, therefore, the misrepresentation be not as to a material matter, and be not relied on, and not it, but something else, is the cause of the damage, it cannot be made the basis of recovery.

In connecting such instrumentalities as the cause of the damage, it is not necessary that it should be shown to be the sole or only cause.⁷⁹ It is sufficient if it be a proximate cause.⁸⁰ ✓

The Plaintiff must have been Deceived.

Deceit which does not deceive is not fraud. Therefore, if the vendor conceals a defect in a cannon sold to the vendee, and the latter does not inspect the cannon, he cannot recover in fraud for damages caused by its subsequent explosion.⁸¹ A mere naked lie,

⁷⁸ *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31; *Genesee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790.

⁷⁹ *Safford v. Grout*, 120 Mass. 20; *Warder v. Bowen*, 31 Minn. 335, 17 N. W. 943; *Sioux Nat. Bank v. Norfolk State Bank*, 5 C. C. A. 448, 56 Fed. 139; *Edgington v. Fitzmaurice*, 29 Ch. Div. 459-483; *Peek v. Derry*, 37 Ch. Div. 541.

⁸⁰ *Addington v. Allen*, 11 Wend. (N. Y.) 374; *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52; *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. 489; *Webster v. Bailey*, 31 Mich. 36; *Wakeman v. Dalley*, 51 N. Y. 27; *Risch v. Von Lillienthal*, 34 Wis. 250; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247; *Fowler v. McCann*, 86 Wis. 427, 56 N. W. 1085; *Fulton v. Hood*, 34 Pa. St. 365. And see *Matthews v. Bliss*, 22 Pick. 48; *Tatton v. Wade*, 18 C. B. 371.

⁸¹ *Horsfall v. Thomas*, 1 Hurl. & C. 90. And see *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161.

though told with intent to deceive, upon which nobody acts, and by which nobody is deceived, is not actionable.⁸²

A distinction between reliance and deception should be noted. There may be deception without reliance. One may be deceived by another's misrepresentation, and still not be entitled to recover, because he did not rely upon such representation; as where such representations were made a long time prior to his conduct,⁸³ and his conduct was influenced altogether by other considerations. But, on the other hand, there can be no sufficient reliance without deception. Thus, if a person knew statements to be false,⁸⁴ or did not believe them,⁸⁵ or if he did not know of them specifically,⁸⁶ he cannot say that he relied on them.

Reliance.

False representations do not constitute a cause of action, unless it appears that the person complaining believed them to be true, and acted thereon to his injury.⁸⁷ He cannot recover if it appears that he would have acted as he did in the absence of any representation on the part of the defendant.⁸⁸ Hence, if he learns of the falsity of the representation before the transaction is completed, and carries it out notwithstanding, he cannot recover.⁸⁹ Representations after consummation of a sale are not actionable.⁹⁰ And generally knowledge of the falsity of the representation, or failure of the plaintiff to believe it, or reliance on his own investi-

⁸² *Enfield v. Colburn*, 63 N. H. 218.

⁸³ *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938.

⁸⁴ *Whiting v. Hill*, 23 Mich. 399-405.

⁸⁵ *Griffing v. Diller*, 66 Hun, 633, 21 N. Y. Supp. 407.

⁸⁶ *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

⁸⁷ *Upton v. Levy*, 39 Neb. 331, 58 N. W. 95; *Pearl v. Walter*, 80 Mich. 317, 45 N. W. 181; *Windram v. French*, 151 Mass. 547, 24 N. E. 914; *Nye v. Merriam*, 35 Vt. 438.

⁸⁸ *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. 489; *Holdom v. Ayer*, 110 Ill. 448; *Powers v. Fowler*, 157 Mass. 318, 32 N. E. 166; *Davis v. Davis*, 100 Mich. 162, 58 N. W. 651. See *Alexander v. Church*, 53 Conn. 561, 4 Atl. 103.

⁸⁹ *McEacheran v. Western Transp. Co.*, 97 Mich. 479, 56 N. W. 860; *Vernol v. Vernol*, 63 N. Y. 45. And see *Tuck v. Downing*, 76 Ill. 71. False representations as to obvious facts. *Long v. Warren*, 68 N. Y. 426.

⁹⁰ *Farmers' Stock-Breeding Ass'n v. Scott*, 53 Kan. 534, 36 Pac. 978.

gation, shows that he did not rely thereon,⁹¹ especially where means of correct information were equally accessible to both parties.⁹²

But a mere perfunctory inquiry on the part of the plaintiff is not sufficient to enable a falsifying defendant to escape.⁹³ In general, to escape liability, the defendant may prove that the other party (1) knew the truth,⁹⁴ or (2) relied on his own investigation,⁹⁵ or (3) was not really influenced by the defendant's misrepresentation.⁹⁶ The determination of these questions is ordinarily for the jury.⁹⁷

Materiality of Representations.

It follows logically from the conception of fraud as the cause of the plaintiff's harm that it must be as to a material circumstance.⁹⁸ The courts recognize that what is a material representation depends upon the circumstances of each case, and this is ordinarily for the jury.⁹⁹ Thus, a representation that land is in a city, when in fact it was nine miles away,¹⁰⁰ or that it is free from overflow from a bordering river,¹⁰¹ or generally as to its quality and character,¹⁰²

⁹¹ Clopton v. Cozart, 13 Smedes & M. (Miss.) 363; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Nelson v. Luling, 62 N. Y. 645; Nye v. Merriam, 35 Vt. 438; Taylor v. Guest, 58 N. Y. 262.

⁹² Nounnan v. Sutter County Land Co., 81 Cal. 1, 22 Pac. 515. Means of knowledge immaterial. David v. Park, 103 Mass. 501.

⁹³ Redgrave v. Hurd, 20 Ch. Div. 1; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755.

⁹⁴ Michaud v. Elsenmenger, 46 Minn. 405, 49 N. W. 202.

⁹⁵ Black v. Black, 110 N. C. 398, 14 S. E. 971. If defendant endeavored to mislead plaintiff in making these investigations, this may be new and actionable fraud. Roseman v. Canovan, 43 Cal. 110; Webster v. Bailey, 31 Mich. 36.

⁹⁶ Poland v. Brownell, 131 Mass. 138; Holdom v. Ayer, 110 Ill. 448; Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315.

⁹⁷ Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755.

⁹⁸ Jordan v. Pickett, 78 Ala. 331; Young v. Young, 113 Ill. 430; Dawe v. Morris, 149 Mass. 188, 21 N. E. 313; Davis v. Davis, 97 Mich. 419, 56 N. W. 774; Schwabacker v. Riddle, 99 Ill. 343; Curtiss v. Howell, 39 N. Y. 211.

⁹⁹ Davis v. Davis, 97 Mich. 419, 56 N. W. 774.

¹⁰⁰ Powers v. Fowler, 157 Mass. 318, 32 N. E. 166.

¹⁰¹ Estell v. Myers, 54 Miss. 174.

¹⁰² Martin v. Jordan, 60 Me. 531. And, generally, see Powers v. Fowler, 157 Mass. 318, 32 N. E. 166; Davis v. Davis, 97 Mich. 419, 56 N. W. 774; Id., 100 Mich. 162, 58 N. W. 651.

may be material. On the other hand, if the representation relates to matters extrinsic and collateral to the transaction involved, and concerns it in only a trivial and unimportant way, it affords no ground of action. Perhaps as definite a test of the materiality of a misrepresentation as can be generally stated is this: A statement is always material when the person to whom it is made would not have acted as he did, had he not believed and relied on it.¹⁰³

Conduct of Plaintiff as a Bar to Relief.

There are many circumstances under which no complaint can be heard from a person charging deceit. Between joint tort feors in deceit, there is no cause of action for contribution after judgment rendered against one or more of them. Nor can one of such persons sue the other directly.

Same—Contributory Negligence.

No man can recover for harm he has inflicted on himself. If his own negligence has been the cause of his damage, he cannot recover for it. But, in order that negligence should exist, it is necessary that he should have been guilty of failure to exercise care, under such circumstances as placed on him the duty of exercising diligence. The law recognizes, in many circumstances, the right of one man to rely upon the statements of another. Hence, it is not often such negligence to be credulous, or to fail to use such means of ascertaining the truth as may easily be at hand, as will prevent recovery. There is, indeed, a strong inclination on the part of courts to hold, without any qualification, that a person guilty of a fraudulent misrepresentation cannot escape the effects of his fault on the ground of the injured party's negligence.¹⁰⁴ "The doctrine is well settled, as a rule, that a party guilty of fraudulent conduct shall not be allowed to cry 'Negligence,' as against his own deliberate fraud."¹⁰⁵

¹⁰³ McAleer v. Horsey, 35 Md. 439; Holst v. Stewart, 161 Mass. 516, 37 N. E. 755.

¹⁰⁴ Alfred Shrimpton & Sons v. Philbrick, 53 Minn. 366, 55 N. W. 551; Stewart v. Stearns, 63 N. H. 99; Dambmann v. Schulting, 75 N. Y. 55; Cottrill v.

¹⁰⁵ Linington v. Strong, 107 Ill. 295. And see Rowers v. Thomas, 62 Wis. 480, 22 N. W. 710; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818; Smith v. Smith, 134 N. Y. 62, 31 N. E. 258.

A man may act upon the positive representation of a fact, although means of obtaining correct knowledge were immediately at hand, and open to him.¹⁰⁶

"Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."¹⁰⁷

"It is as much actionable fraud willfully to deceive a credulous person with an improbable falsehood as it is to deceive a cautious, sagacious person with a plausible one. The law draws no line between the two falsehoods."¹⁰⁸

However, the law recognizes that if one's own failure to exercise the precaution a reasonable man would take under the circumstances has caused the damage to himself, he cannot recover; but the law does not proceed on the theory of the merits of the plaintiff, or the demerits of the defendant.¹⁰⁹ Therefore, under extraordi-

Krum, 100 Mo. 397, 13 S. W. 753; *David v. Park*, 103 Mass. 501; *Warder, Bushnell & Glessner Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540; *Eaton v. Winnie*, 20 Mich. 156; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *McClellan v. Scott*, 24 Wis. 81.

¹⁰⁶ *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Dobell v. Stevens*, 3 Barn. & C. 623. See *Smith v. Land & House Property Corp.*, 28 Ch. Div. 7; *Starkweather v. Benjamin*, 32 Mich. 305; *Roberts v. French*, 153 Mass. 60, 26 N. E. 416.

¹⁰⁷ *Porter, J.*, in *Mead v. Bunn*, 32 N. Y. 275-280. And see *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753; *Eaton v. Winnie*, 20 Mich. 156; *Wharf v. Roberts*, 88 Ill. 426; *Stewart v. Stearns*, 63 N. H. 99; *Clark v. Ralls (Iowa)* 24 N. W. 567.

¹⁰⁸ *Barndt v. Frederick*, 78 Wis. 1, 47 N. W. 6; *Leland v. Goodfellow*, 84 Mich. 357, 47 N. W. 591. But see *Ingalls v. Miller*, 121 Ind. 188-191, 22 N. E. 995.

¹⁰⁹ See *Bigelow, Frauds* (Ed. 1888) 523; *Walsh v. Hall*, 66 N. C. 233; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Palmer v. Bell*, 85 Me. 352, 27 Atl. 250, 251; *Gordon v. Parmelee*, 2 Allen (Mass.) 212-214; *Savage v. Stevens*, 126 Mass. 207, 208; *Brown v. Leach*, 107 Mass. 364. "The common law affords to every one reasonable protection against fraud in dealing, but it does not go the romantic length of giving indemnity against the consequences of indolence and folly, or a

nary circumstances, false representations respecting title, inducing the making of a conveyance, may not entitle the grantor to a remedy for deceit.¹¹⁰ A grantor who executes a deed to real estate, trusting to the assurance of the grantee that it would convey nothing, cannot recover for the alleged fraudulent representations, especially if the means of information are equally open to both parties, and the grantor consults his attorney with reference to the deed.¹¹¹ Misrepresentations may be so extravagant that no reasonably prudent man would have believed in or relied on them. Such will not sustain an action for deceit. But this, the jury ordinarily should determine.¹¹²

The conduct of the party charged with fraud, in preventing investigation, and generally in throwing the complainant off his guard, may serve to justify what would otherwise be, on the complainant's part, the want of ordinary care.¹¹³ Whereas, the efforts of one person to have another pursue his own investigation are calculated to raise a strong presumption of good faith.¹¹⁴

SAME—RESULTING DAMAGE.

176. Fraud without damage, or damage without fraud, will not sustain an action of deceit, but where both concur the action will lie.¹¹⁵

"Fraud does not consist in mere intention, but in intention carried out by hurtful acts. It consists of conduct that operates prejudicially to the rights of others, and is so intended."¹¹⁶ In other words, the plaintiff must show, not only that he was deceived by

careless indifference to the ordinary and accessible means of information." 2 Kent, Comm. (13th Ed.) 485.

¹¹⁰ But see *Robins v. Hope*, 57 Cal. 493.

¹¹¹ *Cobb v. Wright*, 43 Minn. 83, 44 N. W. 662; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *Parker v. Moulton*, 114 Mass. 99.

¹¹² *Barndt v. Frederick*, 78 Wis. 1, 47 N. W. 6.

¹¹³ *Schwabacker v. Riddle*, 99 Ill. 343; *Schumaker v. Mather*, 60 Hun, 576, 14 N. Y. Supp. 411; *White v. Mowbray*, 50 Hun, 606, 3 N. Y. Supp. 225.

¹¹⁴ *Woolenslagle v. Runals*, 76 Mich. 545, 43 N. W. 454.

¹¹⁵ *Baily v. Merrell*, 3 Bulst. 95.

¹¹⁶ *Williams, J.*, in *Williams v. Davis*, 69 Pa. St. 21-28.

the defendant's fraud, without such negligence or other fault on his part as will bar his right to recover, and that he relied on the defendant's wrongful act, but also that he acted, or refrained from acting, in consequence, whereby damages resulted to him.¹¹⁷ There is no cause of action without actual damage. Damage is the gist of the action.¹¹⁸ The cause of action accrues, not on the completion of the defendant's fraud, and the plaintiff's conduct in deceived reliance thereon, but upon the happening of the damage subsequent to and consequent thereon.¹¹⁹

The damages which are made the basis of recovery must conform to the legal standard. Inasmuch as the law does not presume damage, the damages which are proved must be substantial. Mere nominal damages are not sufficient.¹²⁰ Damages which are too vague and speculative in their nature do not satisfy the requirements of the law.¹²¹ So damage to business reputation because of loss of money and large creditors, consequent upon a bad bargain induced by the defendant's fraud, cannot be recovered.¹²² Thus, if the defendant, by false representations, induces a third person to revoke a will favorable to the plaintiff, and to execute another will depriving such plaintiff of substantial benefits, no action lies. "The possibility of injury is too shadowy and evanescent to be dealt with by courts of law."¹²³ Remote harm does not complete the cause of action.¹²⁴ Damages for fraud are governed by ordinary principles.

¹¹⁷ *Upton v. Levy*, 39 Neb. 331, 58 N. W. 95; *Dawe v. Morris*, 149 Mass. 191, 21 N. E. 313; *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360. It is actionable per se to draw one into a contract by fraud. *Allaire v. Whitney*, 1 Hill, 484.

¹¹⁸ Lord Blackburn, in *Smith v. Chadwick*, 9 App. Cas. 197.

¹¹⁹ *Currier v. Poor*, 84 Hun, 45, 32 N. Y. Supp. 74.

¹²⁰ *Van Velsor v. Seeberger*, 35 Ill. App. 598.

¹²¹ *Loewer v. Harris*, 6 C. C. A. 394, 57 Fed. 368. And, generally, see *Davis v. Davis*, 84 Mich. 324, 47 N. W. 555; *Freeman v. Venner*, 120 Mass. 424.

¹²² *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119.

¹²³ *Hutchins v. Hutchins*, 7 Hill, 104; *Randall v. Hazelton*, 12 Allen (Mass.) 412.

¹²⁴ *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267.

MALICIOUS PROSECUTION.

177. Malicious prosecution is a wrong to person, estate, or reputation, based upon a previous judicial proceeding.

178. To sustain an action for malicious prosecution, there must be a concurrence of the following elements:

- (a) The commencement of a civil or criminal judicial proceeding.**
- (b) Its termination in favor of the plaintiff in malicious prosecution, except where his success was fraudulent.**
- (c) The plaintiff in malicious prosecution must have been the defendant in the original proceeding, and the defendant in malicious prosecution must have been the prosecutor or plaintiff, or cause of the original proceeding.**
- (d) The absence of any reasonable or probable cause for such proceeding.**
- (e) The proceeding must have been actuated by malice.**
- (f) It must have resulted in damage, conforming to the legal standards, to plaintiff in malicious prosecution.¹²⁵**

SAME—THE JUDICIAL PROCEEDING.

179. To constitute malicious prosecution, there must have been an original judicial proceeding. The tendency of the American courts is to recognize as a basis for malicious prosecution either a civil or criminal original proceeding, even though there may have been no interference with the person or property.

The original proceeding must have been judicial. If it is extra-judicial, the remedy is trespass.¹²⁶ Therefore, where a man is ar-

¹²⁵ *Vanderbilt v. Mathis*, 5 Duer (N. Y.) 304.

¹²⁶ *Turpin v. Remy*, 3 Blackf. 210; *Johnstone v. Sutton*, 1 Term R. 510.

rested on perfect legal process, though maliciously, without probable cause, and is acquitted, he cannot sue in trespass, for false imprisonment, but must sue in case, for malicious prosecution.¹²⁷ There is not a unanimity of opinion in applying this requirement.¹²⁸ Malicious prosecution, it seems, will not lie where the court has no jurisdiction of the subject-matter.¹²⁹ But it is sufficient if the plaintiff was actually brought before the court, although there may have been an insufficient complaint, defect of process, or want of jurisdiction in the magistrate.¹³⁰ It is both affirmed and denied that, where the complaint in the original proceeding does not set out an offense in the law, the plaintiff can recover in false imprisonment only, and not in malicious prosecution.¹³¹ So dismissal by a magistrate on hearing, or his decision that a warrant is void on its face, has been held to entitle to trespass, not case.¹³²

What Judicial Proceedings are Sufficient.

The authorities are not agreed as to what judicial proceedings are sufficient as a basis for an action of malicious prosecution.

Malicious prosecution lies, clearly, where the original proceeding was criminal in its nature. Very commonly, the action is brought where the original proceeding was a malicious arrest.¹³³ Preferring a bill before a grand jury is a sufficient prosecution to support an action, whether the grand jury find a true bill or not.¹³⁴ With

¹²⁷ *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603; *King v. Johnston*, 81 Wis. 579, 51 N. W. 1011; *Gelzenleuchter v. Niemeyer*, 64 Wis. 321, 25 N. W. 442; *West v. Smallwood*, 3 Mees. & W. 418.

¹²⁸ Post, p. 359, "Malicious Prosecution and False Imprisonment."

¹²⁹ *Bixby v. Brundige*, 2 Gray, 129; *Whiting v. Johnson*, 6 Gray, 246.

¹³⁰ *Gibbs v. Ames*, 119 Mass. 60-66.

¹³¹ Compare *Finn v. Frink*, 84 Me. 261, 24 Atl. 851, and *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101, with *Krause v. Spiegel*, 94 Cal. 370, 29 Pac. 707; *Kramer v. Lott*, 50 Pa. St. 495; *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969.

¹³² *Maher v. Ashmead*, 30 Pa. St. 344; *Baird v. Householder*, 32 Pa. St. 168.

¹³³ *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 932; *Lauzon v. Charroux* (R. I.) 28 Atl. 975; *Potter v. Gjertsen*, 37 Minn. 386, 34 N. W. 746. In the same action malicious prosecution may be united with assault and battery. *Peterson v. Toner*, 80 Mich. 350, 45 N. W. 346.

¹³⁴ *Taylor's Case* [1620] Palm. 44; *Jones v. Gwynn*, 10 Mod. 148; *Chambers v. Robinson*, 2 Strange, 691; *Whiteford v. Henthorn*, 10 Ind. App. 97, 37 N. E. 419.

respect to the malicious institutions of civil suits, the authorities are not entirely agreed as to what cases are within the rule.¹³⁵ The general tendency of the American courts would seem to be that, wherever the other elements of malicious prosecution are present, it is immaterial whether the original proceedings be civil or criminal. The broad ground is taken that the prosecution of a civil action, maliciously and without proper cause, terminating favorably to the defendant, produces an injury, for which recovery of damages lies, although there has been no interference with the person or property. The action has been held to lie for forcible entry and unlawful detainer,¹³⁶ for the malicious issuance of an injunction,¹³⁷ for malicious attachment,¹³⁸ or garnishment,¹³⁹ so, for malicious issuance of a search warrant for goods charged to have been stolen,¹⁴⁰ but not, it would seem, for ejectment,¹⁴¹ or an unauthorized action in the name of another.¹⁴² But as to this there is much dispute as to principle, and almost equal division of authorities. On the one hand, it is urged that the defendant is adequately compensated for the damages he sustains by the costs allowed him; that, if such suits are allowed, vexatious litigation will be encouraged (especially since a corresponding right of action should accrue against one who defends without probable cause and with malice), whereby parties would be unfairly subjected to subsequent suits for bringing or defending actions of law.¹⁴³ To this it seems

¹³⁵ Cooley, Torts, p. *187. And see *Quartz Hill Consol. G. Min. Co. v. Eyre*, 11 Q. B. Div. 674-690; *Potts v. Imlay*, 4 N. J. Law, 377.

¹³⁶ *Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356. But see *Mayer v. Walter*, 64 Pa. St. 283.

¹³⁷ *Kohlsaat v. Crate*, 144 Ill. 14, 32 N. E. 481.

¹³⁸ *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772; *Tomlinson v. Warner*, 9 Ohio, 104; *Nelson v. Danielson*, 82 Ill. 545.

¹³⁹ *Schumann v. Torbett*, 86 Ga. 25, 12 S. E. 185.

¹⁴⁰ *Carey v. Sheets*, 67 Ind. 375; *Id.*, 60 Ind. 17; *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223; *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914.

¹⁴¹ *Muldoon v. Rickey*, 103 Pa. St. 110; *Brown v. City of Cape Girardeau*, 90 Mo. 377, 2 S. W. 302.

¹⁴² *Bond v. Chapin*, 8 Metc. (Mass.) 31.

¹⁴³ *Savill v. Roberts*, 1 Ld. Raym. 374; *Quartz Hill Consol. G. Min. Co. v. Eyre*, 11 Q. B. Div. 674; *Smith v. Hintrager*, 67 Iowa, 109, 24 N. W. 744; *State v. Meyer*, 40 N. J. Law, 252; *Emerson v. Cochran*, 111 Pa. St. 619, 4 Atl. 498; *Wetmore v. Mellinger*, 64 Iowa, 741, 18 N. W. 870; *Hibbard v. Ryan*, 46 Ill. App. 313.

a complete answer to say that the English costs afford a much broader compensation than is afforded by the narrow limits within which costs are taxed in this country;¹⁴⁴ that the burden of proof on the litigant is a sufficient deterrent from unjustifiable suits for malicious prosecution, so far as the plaintiff in the original proceeding is concerned; and that the argument as to the corresponding right of action against a defendant improperly imposing a defense fails to distinguish between the position of the parties in the action of law, it being the plaintiff that sets the law in motion, while the defendant merely stands on his legal right.¹⁴⁵ The highly artificial character of the restriction as to requirement of interference with person or seizure of property to make out a case of malicious prosecution is shown by the absence of any corresponding requirements in actions for malicious abuse of process.¹⁴⁶

SAME—TERMINATION OF PROCEEDING.

180. To maintain an action for malicious prosecution, the plaintiff must show that the original proceeding terminated in his favor, if, from its nature, it was capable of such termination; and such termination must have been final, so that it cannot be reviewed.

Success of Plaintiff.

The original proceeding complained of as the basis for an action of malicious prosecution must have terminated in favor of the plaintiff.¹⁴⁸ The action of malicious prosecution must not be brought before the first proceeding is determined, because until then it

¹⁴⁴ See *Whipple v. Fuller*, 11 Conn. 582.

¹⁴⁵ *McPherson v. Runyon*, 41 Minn. 525, 43 N. W. 392; *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881; *Green v. Cochran*, 43 Iowa, 544; *Payne v. Donegan*, 9 Ill. App. 566; *Burnap v. Albert, Taney*, 244, Fed. Cas. No. 2,170; *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537; *Brown v. City of Cape Girardeau*, 90 Mo. 377, 2 S. W. 302; *Pangburn v. Bull*, 1 Wend. 345; *Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356; *Fisher v. Bristow*, 1 Doug. 215.

¹⁴⁶ 2 Saund. Pl. & Ev. 651; *Luddington v. Peck*, 2 Conn. 700; *Swift v. Chamberlain*, 3 Conn. 537; *Watson v. Watson*, 9 Conn. 141; 2 Selw. N. P. 1054.

¹⁴⁸ *O'Brien v. Barry*, 106 Mass. 300; *Basebé v. Matthews*, L. R. 2 C. P. 684; *Fisher v. Bristow*, 1 Doug. 215; *Graves v. Dawson*, 130 Mass. 78.

cannot appear that the first cause was unjust.¹⁴⁹ "For maliciously prosecuting a good cause of action in the manner provided by law, * * * there is no remedy, because there is no wrong."¹⁵⁰ If the original proceeding has not terminated in the plaintiff's favor, all questions as to malice, want of proper cause, and the like, are immaterial.¹⁵¹ Where, however, the proceedings are *ex parte*, and the plaintiff had no opportunity of being heard, there is an exception to the rule requiring success of the plaintiff in the original proceeding.¹⁵² Discharge without judgment or verdict in a civil suit is sufficient.¹⁵³ But acquittal or conviction or discharge or favorable verdict are not the only alternatives. Abandonment may be a termination sufficiently favorable to the plaintiff.¹⁵⁴ It would seem—although there is doubt on the point¹⁵⁵—that the entry of a *nolle prosequi* by the prosecuting officer is a sufficient discharge.¹⁵⁶ Discharge by a magistrate on preliminary examination, if found by the jury to be absolute, will entitle the plaintiff to recover.¹⁵⁷ A compromise of the first cause of action is not, in general, sufficient,¹⁵⁸ nor is an indictment quashed for insufficiency in law.¹⁵⁹

¹⁴⁹ *Hamilburgh v. Shepard*, 119 Mass. 30; *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. 728; *Lowe v. Wartman*, 47 N. J. Law, 413, 1 Atl. 489.

¹⁵⁰ Per Field, J., in *Johnson v. Reed*, 136 Mass. 421-423. And see *Macey v. Childress*, 2 Tenn. Ch. 442; *Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975.

¹⁵¹ *Hergenrather v. Spielman* (Md.) 22 Atl. 1106.

¹⁵² *Steward v. Gromett*, 7 C. B. (N. S.) 191. Et vide *Basebe v. Matthews*, L. R. 2 C. P. 684; *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772; *Bump v. Betts*, 19 Wend. 421.

¹⁵³ *Rossiter v. Minnesota Bradner-Smith Paper Co.*, 37 Minn. 296, 33 N. W. 855; *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

¹⁵⁴ *Cardival v. Smith*, 109 Mass. 158; *Pixley v. Reed*, 26 Minn. 80, 1 N. W. 800.

¹⁵⁵ *Brown v. Randall*, 36 Conn. 56; *Hays v. Blizzard*, 30 Ind. 457; *Stanton v. Hart*, 27 Mich. 539; *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. 728.

¹⁵⁶ *Bell v. Matthews*, 37 Kan. 686, 16 Pac. 97; *Moulton v. Beecher*, 1 Abb. N. C. 193; *Parker v. Farley*, 10 Cush. 279. See *Langford v. Boston & A. R. Co.*, 144 Mass. 431, 11 N. E. 697; *Graves v. Dawson*, 133 Mass. 419, 130 Mass. 78; *Thompson v. Price*, 100 Mich. 558, 59 N. W. 253.

¹⁵⁷ *Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977; *Mentel v. Hippely*, 165 Pa. St. 558, 30 Atl. 1021; *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106.

¹⁵⁸ *Gallagher v. Stoddard*, 47 Hun, 101; *Mayer v. Walter*, 64 Pa. St. 283; *Emery v. Ginnan*, 24 Ill. App. 65.

¹⁵⁹ *McKensie v. Missouri Pac. Ry. Co.*, 24 Mo. App. 392.

SAME—PARTIES TO PROCEEDING.

- 181. The plaintiff in malicious prosecution must have been the defendant or accused in the original proceeding. The defendant in malicious prosecution must have been actually instrumental in putting process of law into force, directly or indirectly.**

The plaintiff in malicious prosecution must have been a defendant in the original proceeding. Therefore a third person, not a party to a proceeding by a judgment creditor to attach lands as the property of the judgment debtor, by which a cloud was cast on the title of such third person, cannot maintain an action against the creditor for malicious prosecution.¹⁶⁰

As to parties defendant, the general principles already considered apply. The test is, was defendant actively instrumental in putting the law into force.¹⁶¹ The ordinary rules as to exemption from liability apply. Therefore a grand juror¹⁶² or a justice of the peace¹⁶³ is not liable in such an action.

SAME—MALICE AND WANT OF PROBABLE CAUSE.

- 182. Want of probable cause and malice must concur to sustain an action for malicious prosecution.**

Malice.

"Malice," as here used, is not necessarily synonymous with "anger," "wrath," or "vindictiveness." Any such ill feeling may constitute malice. But it may be no more than the opposite of bona fides. Any prosecution carried on knowingly, wantonly, or obstinately, or merely for the vexation of the person prosecuted, is ma-

¹⁶⁰ *Duncan v. Griswold*, 92 Ky. 546, 18 S. W. 354.

¹⁶¹ *Danby v. Beardsley*, 43 Law T. (N. S.) 603, per Justice Lobey. This is the only definition explicitly suggested. Et vide *Vennum v. Huston*, 38 Neb. 293, 56 N. W. 970; *Holden v. Merritt* (Iowa) 61 N. W. 390; *Bicknell v. Dorion*, 16 Pick. (Mass.) 478.

¹⁶² *Sidener v. Russell*, 34 Ill. App. 446.

¹⁶³ *Vennum v. Huston*, 38 Neb. 293, 56 N. W. 970.

licious.¹⁶⁴ Every improper or sinister motive constitutes malice, in this sense.¹⁶⁵ The plaintiff is not required to prove "express malice," in the popular sense.¹⁶⁶ The test is, was the defendant actuated by any indirect motive, in preferring the charge or commencing the action against the plaintiff.¹⁶⁷ Malice may be express, or it may be implied from want of probable cause,¹⁶⁸ but it does not follow as a necessary inference.¹⁶⁹

Probable Cause.

Probable cause, in criminal cases, is such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken for public motives.

Probable cause, in civil actions, is such reasons, supported by facts and circumstances, as will warrant a cautious, reasonable, and prudent man in the honest belief that his action, and the means taken in prosecution of it, are legal, just, and proper.¹⁷⁰ The absence of a probable cause may be inferred from the institution of a criminal suit for the sole purpose of collecting a debt.¹⁷¹

Inference from Conviction, Acquittal, or Dismissal.

Conviction of the crime charged is, in general, evidence of probable cause. But the authorities are not agreed as to whether such evidence is final. On the one hand, it is contended that, in the ab-

¹⁶⁴ Kerr v. Workman, Add. (Pa.) 270.

¹⁶⁵ Tindal, C. J., in Stockley v. Hornidge, 8 Car. & P. 16.

¹⁶⁶ Pullen v. Glidden, 66 Me. 202; Lunsford v. Dietrich, 93 Ala. 565, 9 South. 308; Musgrove v. Newell, 1 Mees. & W. 582.

¹⁶⁷ Hicks v. Faulkner, 8 Q. B. Div. 167; Mitchell v. Jenkins, 5 Barn. & Adol. 588. "Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is malicious." Stevens v. Midland Counties Ry. Co., 10 Exch. 352.

¹⁶⁸ Smith v. Burrus, 106 Mo. 94, 16 S. W. 881. But want of probable cause cannot be inferred from malice. Miller v. Milligan, 48 Barb. 30.

¹⁶⁹ Cartwright v. Elliott, 45 Ill. App. 458.

¹⁷⁰ Burton v. St. Paul, M. & M. Ry. Co., 33 Minn. 189, 22 N. W. 300. See, generally, Nachtman v. Hammer, 155 Pa. St. 200, 26 Atl. 311; Carl v. Ayers, 58 N. Y. 14; Foshay v. Ferguson, 2 Denio (N. Y.) 617; Ferguson v. Arnow, 142 N. Y. 580, 37 N. E. 626; Mahaffey v. Byers, 151 Pa. St. 92, 25 Atl. 93; Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

¹⁷¹ Kimball v. Bates, 50 Me. 308; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101; Neufeld v. Rodeminski, 144 Ill. 83, 32 N. E. 913. But see Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007.

sence of fraud procuring conviction,¹⁷² a conviction by a trial court is conclusive against the plaintiff,¹⁷³ although followed by acquittal on appeal.¹⁷⁴ On the other hand, it is insisted that proof of conviction is only such evidence as is sufficient to establish probable cause if not overcome.¹⁷⁵ Conviction does not, however, negative malice.¹⁷⁶

Similarly, acquittal is prima facie evidence for the plaintiff; but this may have been shown to have been obtained by fraud, as by breach of verbal stipulation for continuance.¹⁷⁷ The voluntary dismissal of an action is not an admission of want of probable cause.¹⁷⁸

Effect of Honest Belief.

Probable cause naturally depends upon the good faith and honest and reasonable belief of the defendant.¹⁷⁹ "And although the facts known make out a prima facie case of guilt, yet if the circumstances are all consistent with the innocence of the party, and the prosecutor knows the accused is not guilty, or does not believe him to be guilty, he cannot have reasonable cause for the prosecution."¹⁸⁰

But merely honest belief on the part of the plaintiff as to the defendant's guilt or wrong, while it may disprove express malice, is not sufficient to constitute probable cause.¹⁸¹

¹⁷² Payson v. Caswell, 22 Me. 212. Compare Lawrence v. Cleary, 88 Wis. 473, 60 N. W. 793; Morton v. Young, 55 Me. 24.

¹⁷³ Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co., 120 U. S. 141, 7 Sup. Ct. 472; Boogher v. Hough, 99 Mo. 184, 12 S. W. 524; Parker v. Farley, 10 Cush. (Mass.) 279; Phillips v. Village of Kalamazoo, 53 Mich. 33, 18 N. W. 547.

¹⁷⁴ Adams v. Bicknell, 126 Ind. 210, 25 N. E. 804; Marks v. Townsend, 97 N. Y. 590; Cloon v. Gerry, 13 Gray (Mass.) 201.

¹⁷⁵ Moffatt v. Fisher, 47 Iowa, 473; Johnson v. Girdwood, 7 Misc. Rep. 651, 28 N. Y. Supp. 151.

¹⁷⁶ Lewton v. Hower, 35 Fla. 58, 16 South. 616.

¹⁷⁷ Leyenberger v. Paul, 40 Ill. App. 516; Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414; Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007.

¹⁷⁸ Asevado v. Orr, 100 Cal. 293, 34 Pac. 777.

¹⁷⁹ Barton v. Kavanaugh, 12 La. Ann. 332.

¹⁸⁰ Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728; Griffin v. Chubb, 7 Tex. 603; Roy v. Goings, 112 Ill. 656; Ravenga v. Mackintosh, 2 Barn. & C. 693-698. And see Stewart v. Sonneborn, 98 U. S. 187.

¹⁸¹ Brown v. Hawkes [1891] 2 Q. B. Div. 718; Winebiddle v. Porterfield, 9 Pa. St. 137; Garrett v. Mannheim, 24 Minn. 193.

Advice of Counsel.

If a party lays all the facts of his case fairly before a person learned in the law, and acts in good faith on the opinion given him, he can show probable cause, and is not liable to an action for malicious prosecution.¹⁸² He must act in good faith. Mere disclosure, without belief in guilt, is not sufficient.¹⁸³ It must be affirmatively shown that the disclosure was full, fair, and in good faith;¹⁸⁴ and where a material circumstance, known, or which should have been known, by the defendant, was not included in the statement to the counsel,¹⁸⁵ or where facts are exaggerated,¹⁸⁶ probable cause is not made out. The counsel must be learned in the law, in order to make his advice a justification.¹⁸⁷ It is not sufficient if he be an unprofessional person.¹⁸⁸ It seems that counsel must also be unbiased.¹⁸⁹

Concurrence of Malice and Want of Probable Cause.

In *Farmer v. Sir Robert Darling*,¹⁹⁰ all the judges agreed "that malice, either express or implied, and the want of probable cause,

¹⁸² *Ravenga v. Mackintosh*, 2 Barn. & C. 693; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357; *Leahey v. March*, 155 Pa. St. 458, 26 Atl. 701; *Walter v. Sample*, 25 Pa. St. 275; *Palmer v. Broder*, 78 Wis. 483, 47 N. W. 744; *Folger v. Washburn*, 137 Mass. 60; *Roy v. Goings*, 112 Ill. 656; *Barhight v. Tammany*, 158 Pa. St. 545, 28 Atl. 135. But advice of counsel may not be conclusive evidence of probable cause. *Gulf, C. & S. F. Ry. Co. v. James*, 73 Tex. 12, 10 S. W. 744; *Rives v. Wood* (Ky.) 15 S. W. 131; *Fugate v. Millar*, 109 Mo. 281, 19 S. W. 71; *Womack v. Fudikar*, 47 La. Ann. 33, 16 South. 645.

¹⁸³ *Vann v. McCreary*, 77 Cal. 434, 19 Pac. 826; *Johnson v. Miller*, 82 Iowa, 693, 47 N. W. 903, and 48 N. W. 1081; *Godfrey v. Sonlat*, 33 La. Ann. 915.

¹⁸⁴ *Barhight v. Tammany*, 158 Pa. St. 545, 28 Atl. 135.

¹⁸⁵ *Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916; *Webster v. Fowler*, 89 Mich. 303, 50 N. W. 1074; *Norrell v. Vogel*, 39 Minn. 107, 38 N. W. 705.

¹⁸⁶ *Flora v. Russell*, 138 Ind. 153, 37 N. E. 593.

¹⁸⁷ *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414; *Brobst v. Ruff*, 100 Pa. St. 94; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101. Et vide *Govaski v. Downey*, 100 Mich. 429, 59 N. W. 167 (but see *Holmes v. Horger*, 96 Mich. 408, 56 N. W. 3); *Monaghan v. Cox*, 155 Mass. 487, 30 N. E. 467; *Cooper v. Hart*, 147 Pa. St. 594, 23 Atl. 833. Compare *Stimer v. Bryant*, 84 Mich. 466, 47 N. W. 1090.

¹⁸⁸ *Beal v. Robeson*, 8 Ired. (N. C.) 276.

¹⁸⁹ *Smith v. King*, 62 Conn. 515, 26 Atl. 1059.

¹⁹⁰ 4 Burrows, 1971-1974. Et vide *Anon.*, 6 Mod. 73.

must both concur." In *Sutton v. Johnstone*,¹⁹¹ however, it was said that the essential ground of malicious prosecution is that the legal proceeding "was carried on without probable cause. We said this is, emphatically, the essential ground, because every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. From the most express malice the want of probable cause cannot be implied."

Malice is, however, an essential element of malicious prosecution. The want of probable cause, without malice, is not sufficient.¹⁹² But the plaintiff cannot recover if the defendant had reasonable and probable cause, even though he acted with malice, and though the charge on which the arrest was made was untrue.¹⁹³

Province of Court and Jury.

Probable cause in malicious prosecution is a mixed question of law and fact.¹⁹⁴ The authorities are agreed, with essential unanimity, that what circumstances are sufficient to prove probable cause must be decided by the court; that, where there is no conflict in the testimony as to what these circumstances are, the court must pass upon the whole case; but that, where the evidence is conflicting, it must be left to the jury to apply to the facts, as found by them, the law as to what constitutes reasonable and probable cause, as defined by the court. Malice is ordinarily exclusively for the jury; but if the court finds the presence of probable cause, as a matter of law, there is nothing for the jury to pass upon.¹⁹⁵

¹⁹¹ 1 Term R. 493-510; 1 Brown, P. C. 76. But see *Mitchell v. Jenkins*, 5 Barn. & Adol. 588.

¹⁹² *Emerson v. Cochran*, 111 Pa. St. 619, 4 Atl. 498. Malice is a distinct issue. *Smith v. Maben*, 42 Minn. 516, 44 N. W. 792; *Vanderbilt v. Mathis*, 5 Duer, 304.

¹⁹³ *Redman v. Stowers* (Ky.) 12 S. W. 270; *Mitchell v. Jenkins*, 5 Barn. & Adol. 588.

¹⁹⁴ *Munns v. Dupont*, 3 Wash. C. C. 31-41, Fed. Cas. No. 9,926.

¹⁹⁵ *Sanders v. Palmer*, 5 C. C. A. 77, 55 Fed. 217; *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969; *Stewart v. Sonneborn*, 98 U. S. 187; *Thompson v. Price*, 100 Mich. 558, 59 N. W. 253; *Leahy v. March*, 155 Pa. St. 458, 26 Atl. 701; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007; *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695.

SAME—DAMAGES.**183. Damages are the gist of an action for malicious prosecution.**

The necessity of alleging and proving damages as a part of the case has been recognized, although damage is not usually included in the enumeration of the essential elements of malicious prosecution. Malicious prosecution is a conspicuous illustration of a class of malicious wrongs, of which the gist is damages. Trespass and false imprisonment may be malicious, and therefore the basis of the award of exemplary damages; but even in the absence of proof of malice or proof of damage, the sufferer can recover. In other words, they are based upon the absolute or simple rights from the violation of which damage is presumed. In malicious prosecution, however, there can be no recovery unless actual damage, conforming to the standard of the law, is alleged and proved; that is to say, the right violated is the right not to be harmed.¹⁹⁶

SAME—DISTINCTION FROM FALSE IMPRISONMENT.**184. Malicious prosecution and false imprisonment are two different causes of action, composed of different elements. They are not incompatible, however, but may arise out of the same state of facts, and be the basis of the same action.**

False imprisonment is a radically different wrong from malicious prosecution.¹⁹⁷ Recovery of damages in an action for false imprisonment is no bar to an action for malicious prosecution.¹⁹⁸ False imprisonment is a direct injury to the freedom of the person, and, at common law, was an action of trespass. Malicious prosecution may be entirely independent of personal interference, and always

¹⁹⁶ Byne v. Moore, 5 Taunt. 187; Bigelow, Lead. Cas. 181.

¹⁹⁷ Brown v. Chadsey, 39 Barb. 253.

¹⁹⁸ Guest v. Warren, 23 Law J. Exch. 121.

gives rise to an action on the case.¹⁹⁹ The very statement of the facts in the case of false imprisonment shows the acts involved to be illegal.²⁰⁰ The ground of malicious prosecution is the procuring to be done what upon its face is, or may be, a legal act, from malicious motives, and without probable cause.²⁰¹ That there should have been an original legal proceeding of some kind, and that the plaintiff should have succeeded in it, is an essential element peculiar to malicious prosecution.²⁰² The coincidence of malice and want of probable cause is also peculiar to malicious prosecution. Malice is never properly an essential element of false imprisonment;²⁰³ and probable cause, only when there has been an arrest without warrant, and then as matter of the defendant's, and not of the plaintiff's, case. Accordingly, advice of an attorney is no defense to false imprisonment; warrant of arrest, in perfect form, is not to malicious prosecution.

On the other hand, there is no incompatibility between the two causes of action. The same state of facts may constitute both false imprisonment and malicious prosecution.²⁰⁴ The two causes of action arising out of the same state of facts may be united in the same pleading, and the plaintiff may recover under either.²⁰⁵

¹⁹⁹ Ante, p. 350; *Brown v. Chadsey*, 39 Barb. 253.

²⁰⁰ Imprisonment caused by a malicious prosecution is not false unless without legal process or extrajudicial. *Nebenzahl v. Townsend*, 61 How. Prac. 356; *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603; *Colter v. Lower*, 35 Ind. 285; *Turpin v. Remy*, 3 Blackf. 210; *Mitchell v. State*, 12 Ark. 50.

²⁰¹ *Johnstone v. Sutton*, 1 Term R. 510; *Mullen v. Brown*, 138 Mass. 114; *Herzog v. Graham*, 9 Lea (Tenn.) 152; *Woodward v. Washburn*, 3 Denio, 369.

²⁰² *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 932.

²⁰³ *Carey v. Sheets*, 60 Ind. 17; *Johnson v. Bouton*, 35 Neb. 898, 53 N. W. 995.

²⁰⁴ *Weil v. Israel*, 42 La. Ann. 955, 8 South. 826. Compare with *Sloan v. Schomaker*, 136 Pa. St. 382, 20 Atl. 525; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101.

²⁰⁵ *Bradner v. Faulkner*, 93 N. Y. 515; *Marks v. Townsend*, 97 N. Y. 590; *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695; *Krug v. Ward*, 77 Ill. 608. The plaintiff has, however, been required to elect between them. *Nebenzahl v. Townsend*, 61 How. Prac. 353.

MALICIOUS ABUSE OF PROCESS.

185. An action for damages lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent proceedings.

The leading case on this subject is *Grainger v. Hill*,²⁰⁶ where the defendant was held liable, not for putting process of arrest in force, but for abusing it for an object not within its scope. The officer arrested the owner of a vessel on civil process, and used such process to compel the defendant to give up his ship's register.²⁰⁷ Damages were recovered, not for maliciously putting the process in force, but for maliciously abusing it; leading the person arrested to do some collateral thing, which he could not lawfully be compelled to do.²⁰⁸ A common form of abuse of process is excessive attachment.²⁰⁹

Malicious abuse of process is distinguished from malicious prosecution in at least two respects: First, in that want of probable cause is not an essential element,²¹⁰ and, second, that it is not essential that the original proceeding shall have terminated.²¹¹ It differs from the false imprisonment in that, *inter alia*, a warrant valid on its face is no defense, and it is entirely inconsistent with extraju-

²⁰⁶ 4 Bing. (N. C.) 212; *Jenings v. Florence*, 2 C. B. (N. S.) 467.

²⁰⁷ *Barnett v. Reed*, 51 Pa. St. 190; *Malcom v. Spoor*, 12 Metc. (Mass.) 279; *Esty v. Wilmot*, 15 Gray (Mass.) 168.

²⁰⁸ *Page v. Cushing*, 38 Me. 523; *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567; *Johnson v. Reed*, 136 Mass. 421; *Holley v. Mix*, 3 Wend. 350.

²⁰⁹ *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747.

²¹⁰ *Hazard v. Harding*, 63 How. Prac. 326. Compare *Juchter v. Boehm*, 67 Ga. 534; *Crusselle v. Pugh*, 71 Ga. 744.

²¹¹ *Bebinger v. Sweet*, 1 Abb. N. C. 263; *Driggs v. Burton*, 44 Vt. 124; *Mayer v. Walter*, 64 Pa. St. 283; *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772; *Antcliff v. June*, 81 Mich. 477, 45 N. W. 1019; *Emery v. Ginnan*, 24 Ill. App. 65.

dicial proceedings.²¹² It has, however, been held that an action for false imprisonment may lie for misuse or abuse of legal process after it has issued.²¹³

MALICIOUS INTERFERENCE WITH CONTRACT.

186. Actions to recover damages for malicious interference with contract have been generally recognized in England, and sometimes in America.²¹⁴

186a. Four things are necessary to sustain the action:

- (a) A contract.**
- (b) Knowledge of the contract on the part of defendant.**
- (c) Malice on the part of defendant.**
- (d) Damage suffered by plaintiff.**

In England.

In the celebrated case, *Lumley v. Gye*,²¹⁵ the plaintiff, the manager of a theater, had contracted with an opera singer to perform for him exclusively during the term of her engagement. The defendant, knowing this, and maliciously intending to injure the plaintiff as a manager, while the agreement was in force, and before the expiration of the term, enticed and procured the singer to wrongfully refuse to execute the contract. The majority of the court regarded the case as in strict analogy to the ordinary case of master and servant, as one of pure tort, and as resting on natural principles of tort, in that whoever maliciously procures the violation of another's right, whether involving a contract or not, ought to be made to indemnify. Coleridge, J., dissenting, however, urged that actions under the statute of laborers were confined to menial servants, that only the parties to the contract should be allowed to recover under

²¹² *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011. But see *Holley v. Mix*, 3 Wend. 350; *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567.

²¹³ *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567.

²¹⁴ *Walker v. Cronin*, 107 Mass. 555; *Lumley v. Gye*, 2 El. & Bl. 216; *Temperton v. Russell* [1893] 1 Q. B. 715; *Lange v. Benedict*, 73 N. Y. 12.

²¹⁵ 2 El. & Bl. 216.

it, and that the damages claimed in this case were objectionable as remote. The rule established in this case has been subsequently followed in England.²¹⁶ It is not material whether the contract maliciously interfered with is between a master and servant or not. If the interference is used for the purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, the conduct is malicious.²¹⁷

In America.

In *Walker v. Cronin*,²¹⁸ the English rule was followed. "Every one," it was said, "has the right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, and annoyance. If the disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*; * * * but if it comes merely from wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it stands on a different footing," and the wrongdoer is liable. *Lumley v. Gye* has been followed in a number of other cases,²¹⁹ and by the supreme court of the United States in *Angle v. Chicago, St. P., M. & O. Ry. Co.*²²⁰ On the other hand, the numerical weight of authority would seem to be against recognition

²¹⁶ *Bowen v. Hall*, 6 Q. B. Div. 335; *Temperton v. Russell* [1893] 1 Q. B. 715; *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 453, 458.

²¹⁷ *Temperton v. Russell* [1893] 4 Reports, 376.

²¹⁸ 107 Mass. 555, approved in *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 816. And see *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307.

²¹⁹ *Jones v. Stanly*, 76 N. C. 355; *Bixby v. Dunlap*, 56 N. H. 456; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, 43 Ga. 601; *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82; *Aldridge v. Stuyvesant*, 1 Hall (N. Y.) 210; *Dickson v. Dickson*, 33 La. Ann. 1261; *Upton v. Vall*, 6 Johns. 181; *Barr v. Essex Trades Council* (N. J. Ch.; Dec. 26, 1894) 30 Atl. 881, reviewing cases; *Lally v. Cantwell*, 30 Mo. App. 524; *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934.

²²⁰ 14 Sup. Ct. 240; 7 Harv. Law Rev. 428 (Jan. 13, 1894). It was said in *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57: "An action cannot in general be maintained for inducing a third person to break his contract with plaintiff; for one party to the contract may have his remedy by suing on it,"—approving *Cooley*, Torts, 497.

of such a moral wrong as the basis of a judicial action.²²¹ Thus, in a case similar to *Lumley v. Gye*, the defendant induced Mary Anderson to break her contract with her manager, the plaintiff. The court held that the action could not be maintained, because it was not the policy of the law to restrict competition, whether concerning property or personal services; that the only occasion for more stringent regulation of the latter is in purely domestic relations; and that ordinarily the employer should look only to the person employed, when there was a breach of the contract, just as the seller must look to the buyer, and the creditor to the debtor, in default of payment.²²²

CONSPIRACY.

187. A conspiracy is an agreement or engagement of persons to co-operate in accomplishing some unlawful purpose, or some purpose which may not be unlawful, by unlawful means.²²³ The conspirators are liable for conduct pursuant to such agreement to inflict injury. The injury done, and not the conspiracy, is the gist of the action.²²⁴

188. The charge of conspiracy may be of use—

- (a) To create a liability in cases of tort actionable only when committed by two or more;**
- (b) To enable the defendant to apply principles of liability of joint tortfeasors to conspirators;**
- (c) To enlarge the scope of evidence admissible;**
- (d) To aggravate damages; and**
- (e) To entitle to an injunction.**

“Conspiracy” naturally refers to some agreement for joint action. At common law, it was the name of a writ. That writ did not take

²²¹ *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57; *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492. And see 2 Harv. Law Rev. 19, and dissenting opinion, *Haskins v. Royster*, 70 N. C. 601.

²²² *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60.

²²³ *State v. Mayberry*, 48 Me. 218.

²²⁴ *Hutchins v. Hutchins*, 7 Hill, 104.

its appellation from the wrong it was designed to remedy. On the contrary, the wrong to which it issued was malicious prosecution; but it issued only when persons, by agreement, united in concerted malicious prosecution.²²⁵ The practice is supposed to have its origin in the phraseology of 21 Edw. I.²²⁶ Because of confusion as to this old writ, and of civil with criminal conspiracy, there is much uncertainty in the meaning given to, and the use made of, the term. Indeed, the term is now commonly applied to unlawful combinations of workmen to raise their wages, or otherwise improve their condition.²²⁷

Injury the Gist of the Action.

A civil conspiracy is an unlawful combination or agreement between two or more persons to do an act unlawful in itself, or a lawful act by unlawful means.²²⁸ But, as has been shown, mere agreement to do wrong is not actionable. There must be some overt act consequent upon such agreement, to give the plaintiff a standing in a court of law, although it may be otherwise in equity. The liability is damages for doing, not for conspiring.²²⁹ The charge of conspiracy does not change the nature of the act. The true test of liability, in cases of conspiracy, is whether or not there is conduct in pursuance of a conspiracy, and injury—not merely damage—resulting from such conduct.²³⁰ The general nature of the wrong is the malicious interference with certain general rights recognized and protected by the law.²³¹

²²⁵ Bigelow, Lead. Cas. 214. Strikes and boycotts as conspiracy. *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48.

²²⁶ Bigelow, J., in *Parker v. Huntington*, 2 Gray (Mass.) 124. And see *Van Syckel, J.*, in *Van Horn v. Van Horn*, 56 N. J. Law, 318, 28 Atl. 669.

²²⁷ Toml. Law Dict. tit. "Conspiracy." And see post, p. 336.

²²⁸ *King v. Jones*, 4 Barn. & Adol. 345; *Breitenberger v. Schmidt*, 38 Ill. App. 168; *Angle v. Chicago, St. P., M. & O. R. Co.*, 151 U. S. 1, 14 Sup. Ct. 240; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310; *Temperton v. Russell*, [1893] 1 Q. B. 715.

²²⁹ *City of Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210.

²³⁰ Damage is of the gist. *Hutchins v. Hutchins*, 7 Hill, 104.

²³¹ *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485. Et vide *Place v. Minster*, 65 N. Y. 89; *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401; *Parker v. Huntington*, 2 Gray (Mass.) 124; *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222; *Herron v. Hughes*, 25 Cal. 556.

Use of Charge of Conspiracy.

It is often loosely said that the allegation of conspiracy in an action on tort is immaterial and surplusage, and that the fact of conspiracy became actionable only when the act would be a ground of suit if done by a single person.²³² The language is too broad. Conspiracy establishes liability as joint tort feorsors. So conspiracy may aggravate damages, for it necessarily shows willfulness. It enlarges the range of evidence admissible, for the acts and declarations of one conspirator are admissible against the others. It is not quite accurate therefore to say that a charge of conspiracy is surplusage. Mere silent approval of an unlawful act does not, however, render one liable as a conspirator;²³³ nor does presence as a spectator;²³⁴ nor membership in an association to prosecute, unless the member sought to be charged intentionally aided in the prosecution.²³⁵ But actual participation need not be proved.²³⁶

SAME—STRIKES AND BOYCOTTS.**189. The essential elements of strikes and boycotts actionable as torts are—**

- (a) **A combination of persons to do harm to another;**
- (b) **Malicious intent; and**
- (c) **Damage to complainant.**

The Combination.

It is constantly and loosely said that, what one person may lawfully do singly, two or more may lawfully agree to do, and actually do, jointly.²³⁷ This can by no means be accepted at the present

²³² *City of Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210; *Kimball v. Harman*, 34 Md. 407; *Cooley*, Torts, 125.

²³³ *Brannock v. Bouldin*, 4 Ired. (N. C.) 61; *Johnson v. Davis*, 7 Tex. 173.

²³⁴ *Blue v. Christ*, 4 Ill. App. 351.

²³⁵ *Johnson v. Miller*, 63 Iowa, 529, 17 N. W. 34; *Id.*, 82 Iowa, 693, 47 N. W. 903, and 48 N. W. 1081.

²³⁶ *Page v. Parker*, 43 N. H. 363-367; *Tappan v. Powers*, 2 Hall (N. Y.) 277; *Livermore v. Herschell*, 3 Pick. 33; *Bredin v. Bredin*, 3 Pa. St. 81.

²³⁷ "What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful

time as unqualifiedly true. Leaving technical reasoning and authority out of view for a moment, it is evident, from ordinary considerations, that the sum of a number of similar actions may result in a general effect, the elements of which are not apparent in isolated action. The separation of a single animal is not a stampede. A single desertion is not a panic. A single servant may leave his employment without suggesting the paralysis of a general "tie up." One member of a crew might, without wrong, leave a train, on the main traveled road, although it would be a criminal outrage for the entire train crew to abandon the train at the same point. There is, however, abundance of legal authority and reasoning against so artificial a conclusion.

In the criminal law, it is entirely clear that "an agreement to effect an injury or wrong to another by two or more persons constitutes an offense, because the wrong to be effected by a combination assumes a formidable character. When done by one alone, it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of combination."²³⁸ In *Com. v. Carlisle*,²³⁹ (1821) where employers combined to depress the wages of their employes by artificial means, Chief Justice Gibson, "that judge of 'great and enduring reputation,'" ²⁴⁰ said: "There is, between the different parts of the body politic, a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole. The effort

act of many is, not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act." Per Mitchell, J., in *Bohn Manuf'g Co. v. Hollis*, 54 Minn. 223-234, 55 N. W. 1119.

²³⁸ *Rex v. Seward*, 1 Adol. & E. 706. Cf. *Reg. v. Peck*, 9 Adol. & E. 686; *Reg. v. Parnell*, 14 Cox. Cr. Cas. 508-514; *Reg. v. Kenrick*, 5 Q. B. 49; *Com. v. Hunt*, 4 Metc. (Mass.) 111-121; *State v. Stewart*, 59 Vt. 273-286, 9 Atl. 559; *State v. Glidden*, 55 Conn. 46-78, 8 Atl. 890.

²³⁹ *Brightly*, N. P. (Pa.) 36-41; *Callan v. Wilson*, 127 U. S. 540-556, 8 Sup. Ct. 1301; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803; *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190.

²⁴⁰ See *Jenkins, J.*, in *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803-815.

of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest, or that of any other individual, beyond the limit of fair competition. But, the increase of power by combination of means being in geometrical proportion to the number concerned, an association may be able to give it impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual." This distinction is recognized in civil cases as the basis of liability in tort, and as resting on sound reasoning, although caution should be exercised not to carry the doctrine beyond the limits necessary for protection of individuals.²⁴¹

This view of the law has received indorsement in the recent strike cases. As a matter of fact, the questions of law which they involve had immediate reference to injunction, rather than to damages, but the underlying principles enunciated control liability in tort.²⁴²

It is insisted that "any man (unless under contract obligation, or employment charging him with a public duty) has a right to refuse to work for or deal with any man, or class of men, as he sees fit; and this right, which one man may exercise singly, any number may agree to exercise jointly."²⁴³ Indeed, the common-law right of la-

²⁴¹ Bowen, L. J., in *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, at page 616. In house of lords ([1892] App. Cas. 25, at page 38) Lord Halsbury said: "I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful."

²⁴² "There would seem to be no good reason why, in some cases at least, the third person injured should not have a remedy also, theoretical but practically useless, against the striker, not for breach of contract, but for a tort committed in that breach by the misfeasance or nonfeasance of duty." Ardemus Stewart, Esq., on the legal side of the strike question, 1 Am. Law Reg. & Rev. 609-614. And see *Temperton v. Russell* [1893] 4 Reports, 376, at page 386, per Lord Justice A. L. Smith; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 815; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746.

²⁴³ Pardee, J., in *Re Higgins*, 27 Fed. 443; Beatty, J., in *Cœur d'Alene Consolidated & Min. Co. v. Miners' Union*, 51 Fed. 260; *Carew v. Rutherford*, 106 Mass. 1; *Bowen v. Matheson*, 14 Allen (Mass.) 499; *Snow v. Wheeler*, 113 Mass. 179; *Walker v. Cronin*, 107 Mass. 555; *Payne v. Western*

borers to combine and use peaceful means to advance their interests, and, more specifically, the price of labor, has been generally broadened by statute.²⁴⁴ Where such a statute extends the common-law rights as to combinations of labor, the courts recognize corresponding changes in the rights of employers to combine to resist employes. Therefore, where employes enter into a lawful combination to control, by artificial means, the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is lawful, since it is not made to lower the price of labor, as regulated by supply and demand.²⁴⁵ However, the right of employes to leave their employment whenever they choose is far from being absolute.²⁴⁶ In *Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co.*,²⁴⁷ Judge Jenkins held that a strike was nec-

& A. R. Co., 13 Lea (Tenn.) 507; Cooley, Torts, 278; *Hilton v. Eckersley*, 6 El. & Bl. 47. And see Sir William Earl's treatise on the Law Relating to Traders' Unions, at page 13.

²⁴⁴ As in *Mayer v. Journeymen Stone-Cutters' Ass'n*, 47 N. J. Eq. 519, 20 Atl. 492. And see *Perkins v. Rogg*, 28 Wkly. Law Bul. 32.

²⁴⁵ *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190. And see *Buchanan v. Barnes* (Pa. Sup.) 28 Atl. 195; *Buchanan v. Kerr*, 159 Pa. St. 433, 28 Atl. 195.

²⁴⁶ "Rights are not absolute, but are relative. Rights grow out of duty, and are limited by duty. One has not the right arbitrarily to quit service without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of his patient. It would be monstrous if a body of surgeons, in aid of such demand, could lawfully combine and conspire to withhold their services. * * * It would be intolerable if counsel were permitted to demand larger compensation, and to enforce his demand by immediate abandonment of his duty in the midst of a trial. It would be monstrous if the bar of a court could combine and conspire in aid of such extortion by one of its members, and refuse their service. I take it that in such case, if the judge of the court had proper appreciation of the duties and functions of his office, that court, for a time, would be without a bar, and the jail would be filled with lawyers. It cannot be conceded that an individual has the legal right to abandon service whenever he may please. His right to leave is dependent upon duty, and his duty is dictated and measured by the exigency of the occasion." *Jenkins, J., in Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803, 812.

²⁴⁷ He defined a strike to be (at page 821) "a combined effort among workmen

essarily illegal. In *Arthur v. Oakes*,²⁴⁸ however, Mr. Justice Harlan said: "We are not prepared, in the absence of evidence, to hold, as a matter of law, that a combination among employes, having for its object their orderly withdrawal, in large numbers or in a body, from the service of their employer, on account simply of a reduction in their wages, is not a strike, within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not either illegal or criminal." It was held in this case, however, that "an intent upon the part of a single person to injure the rights of others, or of the public, is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent; but a combination of two or more persons,

to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of, and the least effective of, the means to the end; the intimidation of others from engaging in the service, the interference with, and the disabling and destruction of, property, and resort to actual force and violence, when requisite to the accomplishment of the end, being the other, and more effective, means employed. It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is impeachment of intelligence. From first to last, * * * force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can come only through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted. The moment that violence becomes an essential part of a scheme, or a necessary means of effecting the purpose of a combination, that moment the combination, otherwise lawful, becomes illegal. All combinations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law. It has well been said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence, the means employed to effect the end being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master, and so, by intimidation, and by the compulsion of force, to accomplish the end designed."

²⁴⁸ 11 C. C. A. 209, 63 Fed. 310-327, citing *Farrer v. Close*, L. R. 4 Q. B. 302-312.

with a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

Malicious Intent.

There are many loose sayings to the effect that the malicious motive makes a bad case worse, but they cannot make that wrong which, in its own essence, is lawful.²⁴⁹ This unqualified statement is not true, as applied universally to the law of torts,²⁵⁰ nor is it true as applied to the matter under consideration. Malicious injury to the business of another has long been held to give a right of action to the injured party.²⁵¹ Judge Taft, in his celebrated opinion in *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*,²⁵² said: "Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do

²⁴⁹ *Jenkins v. Fowler*, 24 Pa. St. 308; *Heywood v. Tillson*, 75 Me. 225; *Morris v. Tuthill*, 72 N. Y. 575; *Mahan v. Brown*, 13 Wend. 261; *Phelps v. Nowlen*, 72 N. Y. 39; *Bohn Manuf'g Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119.

²⁵⁰ Ante, p. 28 et seq.

²⁵¹ *Garret v. Taylor*, Cro. Jac. 567; *Keeble v. Hickeringill*, 11 East, 574; *Gunter v. Astor*, 4 Moore, 12; *Lumley v. Gye*, 2 El. & Bl. 216; *Gregory v. Duke of Brunswick*, 6 Man. & G. 205; *Young v. Hichens*, 6 Q. B. 606; *Temperon v. Russell* [1893] 1 Q. B. 715; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485, affirmed 56 N. J. Law, 318 28 Atl. 669; *Lucke v. Assembly*, 77 Md. 396, 26 Atl. 505; *Curran v. Galen*, 2 Misc. Rep. 553, 22 N. Y. Supp. 826; *Bradley v. Pierson*, 148 Pa. St. 502, 24 Atl. 65; *Ryan v. Brewing Co.*, 59 Hun, 625, 13 N. Y. Supp. 660; *Moores v. Bricklayers' Union*, 23 Wkly. Law Bul. 48, 7 Ry. & Corp. Law J. 108; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345; *International & G. N. Ry. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559; *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934; *Haskins v. Royster*, 70 N. C. 601; *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475, note; *Mapstrick v. Range*, 9 Neb. 390, 2 N. W. 739.

²⁵² 54 Fed. 730-738, and authorities cited. And see *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598.

that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves, and considered singly, are innocent, when the acts are done with malice, i. e. with the intention to injure another without lawful excuse." Indeed, the gravamen of the wrong in cases of this kind is malice.²⁵³ This renders necessary, in cases of this kind, an inquiry as to the intent of the defendants, to ascertain if the case falls within the class in which it is held that malicious motive may make an act, which would not be wrongful without malice, wrongful when done with malice.²⁵⁴ "Malice," as here employed, of course, signifies, not colloquial, but technical, malice. "Malice" means the purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff.²⁵⁵

Damage to Complainant.

While a combination to injure others may be the basis for preventive relief in a court of equity, the wrong is not a complete tort until damage has been suffered. But mere damage alone is not necessarily sufficient. In *Mogul Steamship Co. v. McGregor*,²⁵⁶ on appeal, Bowen, L. J.,²⁵⁷ considered the proposition "that an action will lie if a man maliciously and wrongfully acts so as to injure another in that other's trade." "Obscurity," he said, "resides in the language used to state this proposition. The terms 'maliciously,'

²⁵³ *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485, Chase, Lead. Cas. 109.

²⁵⁴ *Barr v. Essex Trades Council* (N. J. Ch.) 30 Atl. 881.

²⁵⁵ *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485, per Scudder, J.; *Temperton v. Russell*, 4 Reports, 376.

²⁵⁶ This case, as reported in 15 Q. B. Div. 476-482, was regarded by Lord Coleridge, C. J., as involving a boycott. A temporary injunction was, however, refused, because irreparable damage was not shown.

²⁵⁷ 23 Q. B. Div. 598, at pages 612, 613. And see dissenting opinion of Lord Esher, at page 601. This great case was finally appealed and decided. [1892] App. Cas. 25, affirming the decision of the court of appeal. More specifically that since the acts of defendant were done with the lawful object of protection and extending their trade, and increasing their profits, and since they had not employed any unlawful means, the plaintiff had no cause of action. For further report see 61 Law J. Q. B. 295; 66 Law T. (N. S.) 1; 40 Wkly. Rep. 337. See, also, *Walker v. Cronin*, 107 Mass. 555; *Heywood v. Tillson*, 75 Me. 225.

‘wrongfully,’ and ‘injure’ are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to ‘injure,’ in strictness, means more than an intent to harm. It connotes an intent to do wrongful harm. ‘Maliciously,’ in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term ‘wrongful’ imports, in its turn, the infringement of some right. The ambiguous proposition * * * therefore leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. * * * The plaintiffs had a right to be protected against certain kind of conduct, and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated, in the ordinary course of events, to damage, and which does in fact damage, another, in that other person’s property or trade, is actionable, if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a ‘malicious wrong.’”

Principles Applied.

At the one extreme, the exercise of equal rights affords a full justification to the charge of an actionable conspiracy of this kind. In *Mogul Steamship Co. v. McGregor*,²⁵⁸ the defendants, shipowners, formed an association to maintain a monopoly of homeward tea trade, whereby they allowed purchasers of tea shipped exclusively in their vessels a rebate on freights. The plaintiffs, rival shipowners, suffered damage because they were excluded from the benefits of the association. The right to recover was denied because the defendants were pushing their lawful trade by lawful means. Competition afforded a full justification. The motive of the defendant was business gain, without actual malice to the plaintiff.²⁵⁹ No unlawful means were employed.²⁶⁰

²⁵⁸ 23 Q. B. Div. 598.

²⁵⁹ Coleridge, C. J., in 21 Q. B. Div. 544, at page 552.

²⁶⁰ So, wholesale butchers, to protect each other from dishonest and insolvent customers, and otherwise naturally to assist each other, may agree that each, on the request of the other, will refuse to sell merchandise to

At the other extreme, a boycott must, consistently with these cases, be regarded as an actionable wrong. Lawful competition in business may damage another without creating a wrong, but trades unions are not ordinarily competitors of the persons against whom a boycott is directed. There is no rivalry in business. (The purpose of the boycott is, by a combination of many, to cause loss to one person by coercing others, against their will, to suspend or discontinue dealing or patronage because of his refusal to comply with demands of the boycotters.²⁶¹ This is a totally different thing from that competition which is the life of trade. It was accordingly held in *Barr v. Essex Trades Council*²⁶² that the boycott of a newspaper, which included threatening circulars, designed to procure discontinuance of advertisements and decrease of circulation, is an actionable wrong. Boycotts, indeed, have been almost universally regarded as illegal conspiracies, and therefore as actionable wrongs.²⁶³

Between these extremes, the authorities are not in accord. In *Bohn Manuf'g Co. v. Hollis*²⁶⁴ it was held that a voluntary associa-

any butcher indebted to them both, and such butcher cannot recover for consequent injury to his business. *Delz v. Winfree*, 6 Tex. Civ. App. 11, 25 S. W. 50. Cf. *Dueber Watch-Case Manuf'g Co. v. E. Howard Watch Co.*, 3 Misc. Rep. 582, 24 N. Y. Supp. 647.

²⁶¹ Definitions of boycott, 2 Am. & Eng. Enc. Law, 512, quoting *Com. v. Shelton*, 11 Va. Law J. 324. A history and definition of the word, with numerous authorities, as to the rights of employers and employes, and the civil liability of those establishing a boycott, by D. H. Pingrey, 38 Cent. Law J. 427.

²⁶² (N. J. Ch.) 30 Atl. 884.

²⁶³ *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48, 24 Blatchf. 244. See 21 Am. Law Rev. 509, 764; *Barr v. Essex Trades Council* (N. J. Ch.) 30 Atl. 881; *Carew v. Rutherford*, 106 Mass. 1; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; *Casey v. Typographical Union*, 45 Fed. 135; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 738; *Thomas v. Cincinnati Ry. Co.*, 62 Fed. 803, commenting, inter alia, on *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 994; *U. S. v. Patterson*, 55 Fed. 605.

²⁶⁴ *Bohn Manuf'g Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, citing, inter alia, *Bowen v. Matheson*, 14 Allen (Mass.) 499; *Parker v. Huntington*, 2 Gray (Mass.) 124; *Wellington v. Small*, 3 Cush. (Mass.) 145; *Payne v. Western & A. R. Co.*, 13 Lea (Tenn.) 507, and *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598. The conclusion reached may be in harmony with this last case, but cer-

tion of retail dealers could agree not to deal with any manufacturer or wholesale dealer who would sell direct to consumers, and, in accordance with such agreement, notify all members whenever any wholesale dealer or manufacturer made any such sale, without committing an actionable wrong, or creating a basis for the issuance of an injunction. Here the conduct of the retailers' association may have been justified by the exercise of equal rights. It was an effectual check on dangerous competition. Moreover, in this case, as in the cases in which the right of men to quit the employment of their master is recognized, there was simply the exercise jointly of the right any man has to deal with those he chooses, and to quit working whenever he chooses, in the absence of such particular circumstances; as, for example, where there is an attempt to influence the conduct of persons outside of the association. In *Delz v. Winfree*²⁶⁵ the court recognized as correct the proposition that a person

tainly not the process by which it is arrived at. "It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public, or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence." *Gibson, J., in Com. v. Carlisle, Brightly, N. P. (Pa.) 36.* And see *State v. Buchanan, 5 Har. & J. 317; State v. De Witt, 2 Hill (S. C.) 282; State v. Norton, 23 N. J. Law, 33; State v. Donaldson, 32 N. J. Law, 151; State v. Burnham, 15 N. H. 396; State v. Glidden, 55 Conn. 46, 8 Atl. 890; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307; Smith v. People, 25 Ill. 17; State v. Stewart, 59 Vt. 273, 9 Atl. 559; In re Higgins, 27 Fed. 443; Coeur d'Alene Consolidated & Min. Co. v. Miners' Union, 51 Fed. 260; U. S. v. Workingmen's Amalgamated Council, 54 Fed. 994.*

²⁶⁵ 80 Tex. 400, 16 S. W. 111. In the same case it was subsequently distinctly held (6 Tex. Civ. App. 11, 25 S. W. 50) that wholesale butchers, to protect each other from dishonest and insolvent customers, and otherwise naturally to assist each other, may agree that each, on the request of the other, will refuse to sell merchandise to any butcher indebted to them both, and such butcher cannot recover for consequent injury to his business. This doctrine was followed in *Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428.* There it was held that a petition alleging that defendants (wholesale lumber dealers) formed an association agreeing not to sell to others than dealers; that, because of refusal by plaintiff (another dealer) to join such associa-

has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property, but added: "The privilege here asserted must be limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motive influence another person to do the same thing." Accordingly, while it was held that no action for conspiracy would lie for refusal on the part of several dealers in cattle to sell to the complainant (a nonpaying customer), yet such action would lie if they induced another dealer to likewise refuse to sell to him. And in *Temperton v. Russell*²⁶⁶ it was distinctly held that a combination by two or more persons to induce others not to deal with, or to enter into contract with, a particular individual, is actionable, if done for the purpose of injuring that individual, provided he is thereby injured. The courts, however, regard as actionable wrong any attempt to secure a monopoly of business by coercion or intimidation by combinations. From this point of view, *Bohn Manuf'g Co. v. Hollis* has been criticised as in conflict with approved authority, and as being bad as a precedent.²⁶⁷

tion, they had maliciously distributed circulars asking that patronage be withdrawn from plaintiff till he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury,—states a good cause of action. And see *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 826; *Bradley v. Pierson*, 148 Pa. St. 502, 24 Atl. 65; *Kelly v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 957. Cf. *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522.

²⁶⁶ [1933] 4 Reports, 376.

²⁶⁷ *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, and 37 N. E. 14. Here "The Retail Lumber Dealers' Association of Indiana" by its by-laws gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in such member's community, provided for a hearing of the claim by a committee, and required members to refuse to patronize a wholesaler who ignored the committee's decision. Plaintiff, who was not a "regular dealer," underbid defendant on a contract, but wholesalers refused to sell to him, and he was obliged to abandon the contract, because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. Held, that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be

In *Van Horn v. Van Horn* the line is a much finer one, and all the reasoning of the court, though not necessarily their conclusion, can hardly be reconciled with authority, or be found consistent. Here the declaration charged that the defendants conspired to injure the plaintiff in her business of selling fancy goods, which she carried on in her own name, and that, by false and malicious statements concerning her personal and business character, they induced and persuaded one who had supplied her with goods to remove the stock so supplied, and to refuse to deliver what he had expected to let her have, leaving her without any stock to sell, or customers to sell to. It was held by the supreme court of New Jersey that an action lay for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business resulting in damages,²⁶⁸ and that this was not an action of slander,²⁶⁹ and on appeal to the court of last resort²⁷⁰ these views were sustained. It was held that "the rule to be deduced from these cases, and the one which has the most ample support, is that while a trader may lawfully engage in the sharpest competition with those in a like business, by holding out extraordinary inducements, by representing his own wares to be better and cheaper than those of others, yet when he oversteps that line, and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage results from it the injured party is entitled to redress."

perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff.

²⁶⁸ 52 N. J. Law, 284, 20 Atl. 485.

²⁶⁹ 53 N. J. Law, 514, 21 Atl. 1060.

²⁷⁰ 56 N. J. Law, 318, 28 Atl. 669.

CHAPTER X.

WRONGS TO POSSESSION AND PROPERTY.

- 190. Duty to Respect Property and Possession—Remedies.
- 191. Nature of Possession.
- 192. Trespass—Definition.
- 193–195. Possession to Maintain.
- 196. Defenses.
- 197. Remedies.
- 198. Waste—Definition.
- 199–202. Kinds of Waste.
- 203. Remedies.
- 204. Conversion—Definition.
- 205. Title to Maintain.
- 206–209. The Unauthorized Act.
- 210. Parties.
- 211. Remedies.

DUTY TO RESPECT PROPERTY AND POSSESSION— REMEDIES.

190. The common law recognized an absolute duty to respect the property of others, but based its remedies for the violation of such duty upon possession rather than on ownership.

The duty of abstaining from interference with property and possession is absolute, and the courts have gone to great length in recognizing corresponding absolute rights. That a disturbance of property or possession was involuntary and by mistake is no defense, if the physical act was voluntary. Therefore, where one person, in mowing his own grass, mowed by mistake a little of his neighbor's, which was growing alongside, he was held liable.¹ If, however, the act is involuntary, it is otherwise. "If a man who is assaulted and in

¹ *Basely v. Clarkson*, 3 Lev. 37; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; *Donahue v. Shippee*, 15 R. I. 453, 8 Atl. 541; *Huling v. Henderson*, 161 Pa. St. 553, 29 Atl. 276. But see *Webber v. Quaw*, 46 Wis. 118, 49 N. W. 830.

danger of his life run through the close of another without keeping in a footpath, an action for trespass does not lie.”² It is immaterial whether the person trespassing is acting for his own benefit,³ or in good faith to benefit the true owner,⁴ even if benefit result to the owner.⁵ Indeed, intention does not necessarily enter into trespass or conversion. It is sufficient if the act is done without justifiable cause or purpose. Ordinarily, the only effect of intent is upon damages.⁶ Mistake or ignorance affords no excuse; for example, where one buys an ox of another, and by mistake takes away the wrong ox, he is liable.⁷ On the same principle, a purchase of property in good faith from a person having no title is no defense.⁸ Indeed, it has been said that probably one-half the cases in which trespass de bonis asportatis is maintained arise from mere misapprehension of legal rights.⁹ In trover and conversion, however, it has been held that under certain circumstances intention may become an essential of the legal wrong.¹⁰ So, in nuisance, it is not universally true that motive is immaterial.¹¹

Remedies.

The common law provided remedies for injuries to possession and property, and based them upon possession rather than on the right of the property. The action of detinue at common law lay where a party claimed the specific recovery of goods and chattels, or deeds and writings detained from him.¹² For the same purpose, however, trover, one of the actions on the case not requiring

² 9 Bac. Abr. “Trespass,” F.

³ Hollins v. Fowler, 44 Law J. Q. B. 169.

⁴ Trespass, Kirk v. Gregory, 1 Exch. Div. 55; trover, Hlort v. Bott, L. R. 9 Exch. 86.

⁵ Hurley v. Jones, 165 Pa. St. 34, 30 Atl. 499.

⁶ Weaver v. Ward, Hob. 134; Tobin v. Deal, 60 Wis. 87, 18 N. W. 634; Wakeman v. Robinson, 1 Bing. 213; Mairs v. Real-Estate Ass’n, 89 N. Y. 498.

⁷ Hobart v. Hagget, 12 Me. 67. Et vide Wallard v. Worthman, 84 Ill. 446.

⁸ See Loewenberg v. Rosenthal, 18 Or. 178, 22 Pac. 601; Higginson v. York, 5 Mass. 341; Smith v. Webster, 23 Mich. 298; Hazelton v. Week, 49 Wis. 661, 6 N. W. 309.

⁹ Stanley v. Gaylord, 1 Cush. 536-551, per Metcalf, J.

¹⁰ Post, p. 408, “Conversion.”

¹¹ Post, p. 431, “Nuisance.”

¹² Steph. Pl. 16.

the exactness of description necessary for detinue, came into more general use. It claims damages, and is based on the innocent fiction that the defendant, having found the goods, converted them to his own use.¹³ Replevin could only be brought where there had been a taking by trespass, whether under color of legal process or otherwise.¹⁴ Trespass, in its largest and most extensive sense, signifies any transgression or offense against the laws of nature, of society, or of the country in which we live, whether it relates to a man's person or his property.¹⁵ Trespass was used at common law as the name of an action where the injury to the person or property was direct, as trespass vi et armis, for assault and battery or for false imprisonment. Ejectment was a species of personal action of trespass for the recovery of both land and of damages for detention of possession. Trespass on the case was an action arising from the statute of Westminster II., and lay for consequential injuries.¹⁶ Waste was a wrong¹⁷ as well as a remedy.¹⁸ Trespass for damages afforded a simple means for trying title to land. Its use for this purpose has not entirely disappeared.¹⁹

"The forms of [common law] action," says Mr. Pollock,²⁰ "brought not ownership, but possession, to the front, in accordance with a habit of thought which, strange as it may now seem to us, found the utmost difficulty in conceiving rights of property as having full existence, or being capable of transfer and succession, unless in close connection with the physical control of something which could be passed from hand to hand, or at least a part of it delivered in the name of the whole. * * * An owner who had neither possession

¹³ Steph. Pl. 19. Et vide *Burroughes v. Bayne*, 5 Hurl. & N. 296.

¹⁴ Clerk & L. Torts, 186, collecting cases.

¹⁵ 3 Bl. Comm. 208.

¹⁶ Ante, c. 1. *Cole v. Fisher*, 11 Mass. 137.

¹⁷ The common-law action for waste might have been *assumpsit* (1 Chit. 102, 141), or *covenant* (Id. 141), or *case* (Id. 140).

¹⁸ St. Glouc. 6 Edw. I. c. 5.

¹⁹ *Kircher v. Murray*, 8 C. C. A. 448, 60 Fed. 48-52; *Cox v. Hart*, 145 U. S. 376, 12 Sup. Ct. 962; *Downing v. Diaz*, 80 Tex. 436, 16 S. W. 49; *Stephenson v. Wilson*, 37 Wis. 482.

²⁰ Pol. Torts, 416. Et vide *Lambert v. Stroother*, Willes, 218; *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397-405, 18 Atl. 502; *Green v. Goddard*, 2 Salk. 641.

nor the immediate right to possession could redress himself by a special action on the case, which did not acquire any technical name."

NATURE OF POSSESSION.

191. Possession, in its legal sense, is the present enjoyment or right of enjoyment of definite property by a person with a purpose to exercise such property for the benefit of the holder, or facts from which such purpose could be assumed if the mind were directed to the object of possession.²¹

The enjoyment may consist in the contract, the detention, or control of the property; or it may arise from the right to reduce the property to physical control at the time, and the absence of any opposition to the exercise of that right. Mere temporary physical control does not necessarily constitute possession in its legal sense. There must be "something like acquiescence" in the physical fact of occupation on the part of the rightful owner.²² Possession of lands which is merely incidental and subsidiary to the commission of a trespass thereon, as by cutting and removing the timber which is abandoned when that object is accomplished, is not legal possession.²³ Again, mere occupation or control by a servant or tenant at will does not seem to be legal possession.²⁴ Possession may be based on title or on bare physical occupancy or prehension without title. It may, accordingly, be actual or constructive.

²¹ Clerk & L. Torts, 240; Bigelow, Torts, 183; London & County Banking Co. v. London & River Plate Bank, 21 Q. B. Div. 535-542; Reg. v. Ashwell, 16 Q. B. Div. 190.

²² Pol. Torts, 468. "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession." Browne v. Dawson, 12 Adol. & E. 624-629; Holmes v. Wilson, 10 Adol. & E. 503; Illinois & St. L. Railroad & Coal Co. v. Cobb, 82 Ill. 183.

²³ Austin v. Holt, 32 Wis. 478; Thompson v. Burhans, 79 N. Y. 93.

²⁴ Hughes v. Stevens, 36 Pa. St. 320; Ozark Land Co. v. Leonard, 20 Fed. 881; Ware v. Johnson, 55 Mo. 500.

TRESPASS—DEFINITION.

192. Trespass is the wrongful disturbance of another's possession of lands or goods. The disturbance may consist of physical entry on lands, or seizure of goods, or of any other exercise of ownership or control over them inconsistent with the owner's possession.

An unauthorized entry on another's lands was a trespass for which at common law an action *quare clausum fregit* lay. Forcible disturbance of peaceable possession is a trespass.²⁵ If a man's land is not surrounded by any actual fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close.²⁶ Actual and malicious exercise of force is sufficient.²⁷ But force as an essential element of trespass may not be violence; nor need it be actual force, in the popular sense of the term; it may be implied.²⁸ The mere walking over a place whereon is neither grass nor herbage is sufficient,²⁹ and so, in general, is any unauthorized intrusion.³⁰ The disturbance, however, is not necessarily confined to the surface of the land. Interference with minerals,³¹ beneath the surface, and perhaps interference with the column of air above the surface, may constitute trespass.³² A mere nonfeasance is not sufficient, as neglect to repair banks whereby another's land is over-

²⁵ *Dolahanty v. Lucey*, 101 Mich. 113, 59 N. W. 415.

²⁶ *Dougherty v. Stepp*, 1 Dev. & B. 371; *Wells v. Howell*, 19 Johns. (N. Y.) 385.

²⁷ *American Union Tel. Co. v. Middleton*, 80 N. Y. 408.

²⁸ *Green v. Goddard*, 2 Salk. 641; *Hatch v. Donnell*, 74 Me. 163; *Van Leuven v. Lyke*, 1 N. Y. 515.

²⁹ *Entick v. Carrington*, 19 State Tr. 1030-1066.

³⁰ *Dougherty v. Stepp*, 1 Dev. & B. 371.

³¹ *Parker, B.*, in *Smith v. Lloyd*, 9 Exch. 562; *Ashton v. Stock*, 6 Ch. Div. 719; *Guille v. Swan*, 19 Johns. 381.

³² Nailing a board on one's own premises, so as to overhang neighbor's premises, is a trespass. Cf. *Pickering v. Rudd*, 4 Camp. 219, 220, with *Pinchin v. London & B. Ry. Co.*, 1 Kay & J. 34. Projecting of window sills, *Richardson v. Pond*, 15 Gray, 387-390; *Story v. Odin*, 12 Mass. 157. Or a sign, *Devlin v. Snellenburg*, 132 Pa. St. 186, 18 Atl. 1119.

flowed.³³ Similarly, to entitle the owner or possessor of personal property to bring trespass *de bonis asportatis*, he can show a forcible taking of goods; but this is not necessary. "No actual force need to be proved. He who interferes with my goods, and without my consent undertakes to dispose of them as having the property, general or special, does it at his peril to answer me the value in trespass or trover."³⁴ Manual taking or removal is not necessary, although sufficient.³⁵

To show a disturbance of possession, it is not necessary to prove actual damages;³⁶ every invasion of property, be it ever so minute, constitutes a trespass.³⁷ The gist of the action is disturbance of possession. Other averments as to the manner in which the trespass was committed relate to damages only.³⁸

The disturbance may be committed by the defendant himself,³⁹ or by animals (even though the owner had no knowledge of their vicious propensities),⁴⁰ or by inanimate things.⁴¹

³³ Brooke, Abr. Sur. le C. Pl. 36; Hinks v. Hinks, 46 Me. 423.

³⁴ Sewall, J., in Gibbs v. Chase, 10 Mass. 125; Miller v. Baker, 1 Metc. (Mass.) 27; Dexter v. Cole, 6 Wis. 319; Kirk v. Gregory, 1 Exch. Div. 55.

³⁵ Holmes v. Doane, 3 Gray, 328. "Scratching the panel of a carriage would be a trespass." Fouldes v. Willoughby, 8 Mees. & W. 540. Untying a horse from a public hitching post is a trespass. Bruch v. Carter, 32 N. J. Law, 554; Burgess v. Graffam, 10 Fed. 216, 18 Fed. 251.

³⁶ Williams v. Esling, 4 Pa. St. 486.

³⁷ Entick v. Carrington, 19 State Tr. 1029-1066. Et vide Tunbridge Wells Dipper Case, 2 Wils. 414.

³⁸ Taylor v. Cole, 3 Term R. 292; Curtis v. Groat, 6 Johns. 168; Wendell v. Johnson, 8 N. H. 222.

³⁹ Hatch v. Donnell, 74 Me. 163, Chase, Lead. Cas. 150. Every one aiding or encouraging a trespass is liable in trespass. Brown v. Perkins, 1 Allen, 89.

⁴⁰ Van Leuven v. Lyke, 1 N. Y. 515, Chase, Lead. Cas. 152. Cf. Moynahan v. Wheeler, 117 N. Y. 285, 22 N. E. 702.

⁴¹ See Preston v. Mercer, Hardr. 60; Reynolds v. Clarke, 2 Ld. Raym. 1399. Cf. Tenant v. Goldwin, Id. 1089. As to trespass by an engine, see Ambergate, N. & B. & E. J. Ry. Co. v. Midland Ry. Co., 2 El. & Bl. 793.

SAME—POSSESSION TO MAINTAIN.

193. Only persons in actual or constructive possession of lands or chattels at the time the wrong is committed can maintain trespass in reference thereto, and such constructive possession is that of the owner when no person is in actual possession.

To maintain trespass, it is absolutely necessary that the plaintiff be in actual possession, or have the right to take possession at the time of trespass.⁴² A person out of possession of land actually occupied by another cannot succeed in trespass until he has first ousted the possessor and put himself into possession.⁴³ Nor can the owner maintain trespass for taking personal property unless, at the time of taking, he had possession or the right of taking actual possession.⁴⁴ If the house and land, however, be occupied, not by a tenant who is not a tenant at will or lessee, but by a servant of the owner or a tenant at will, the occupation of the servant or the tenant at will is the occupation of the master or owner, and the latter may therefore sue for any act of trespass.⁴⁵ The same principle applies especially with respect to personal property. Under such circumstances, it is not necessary for the owner to reduce the property to possession. Indeed, the tendency of the cases may be said to be to recognize such possession as concurrent, and as entitling both persons to maintain an action based on rights of possession.⁴⁶

⁴² *Ward v. Taylor*, 1 Pa. St. 238; *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442; *Fitch v. New York, P. & B. R. Co.*, 59 Conn. 414, 26 Atl. 345; *Halligan v. Chicago & R. I. R. Co.*, 15 Ill. 558.

⁴³ *Chicago & W. I. R. Co. v. Slee*, 33 Ill. App. 420; *Potter v. Lambie*, 142 Pa. St. 535, 21 Atl. 888; *Wood v. Michigan Air-Line R. Co.*, 90 Mich. 334, 51 N. W. 263.

⁴⁴ *Wilson v. Haley Live-Stock Co.*, 153 U. S. 39, 14 Sup. Ct. 768; *Lunt v. Brown*, 13 Me. 236. A mortgagee, having the right to take possession, may maintain trespass against a stranger who unlawfully interferes, before the debt falls due. *Woodruff v. Halsey*, 8 Pick. 333; *Foster v. Perkins*, 42 Me. 168; *Joseph v. Henderson*, 95 Ala. 213, 10 South. 843.

⁴⁵ *Curtis v. Galvin*, 1 Allen, 215; *Livingston v. Tanner*, 14 N. Y. 64.

⁴⁶ *Knight v. Legh*, 4 Bing. 589; *Starr v. Jackson*, 11 Mass. 519; *Gunsolus*

As between Persons in Special Relations.

While a landlord ordinarily cannot sue in trespass his tenant who is in possession,⁴⁷ the tenant may become a trespasser by willful wrong, and render himself liable to his landlord in trespass.⁴⁸ The owner may sue in trespass a tenant at will who is in actual possession of the premises.⁴⁹

As between tenants in common, possession is concurrent, and all have equal rights of possession and property. No action of trespass will lie unless there be an actual ouster of one tenant in common by another.⁵⁰

194. Actual physical occupation or control is sufficient title to sustain trespass, but not against the true owner or person having right of possession. If it be without title it must be—

- (a) Substantially exclusive,
- (b) With a purpose to exercise possession for the benefit of the holder, and
- (c) At the time of the alleged wrong.

Possession may be with or without Title.

When both ownership and possession coincide, trespass, of course, lies,⁵¹ but mere possession without title, but under claim of right, is sufficient to sustain the action.⁵² Defendant cannot show title in

v. Lormer, 54 Wis. 630, 12 N. W. 62; *White v. Brantley*, 37 Ala. 430; *Ely v. Ehle*, 3 N. Y. 506; *Becker v. Smith*, 59 Pa. St. 469.

⁴⁷ *Chadbourne v. Straw*, 22 Me. 450; *Briggs v. Thompson*, 9 Pa. St. 338; *Ripley v. Yale*, 16 Vt. 257; *Mueller v. Kuhn*, 46 Ill. App. 496.

⁴⁸ *Rogers v. Brooks*, 99 Ala. 31, 11 South. 753; *Emry v. Roanoke Navigation & Water-Power Co.*, 111 N. C. 94, 16 S. E. 18.

⁴⁹ *Ripley v. Yale*, 16 Vt. 257. Cf. *Halligan v. Chicago & R. I. Ry. Co.*, 15 Ill. 558.

⁵⁰ *Murray v. Hall*, 7 Man. G. & S. 441.

⁵¹ As where adverse possession may have ripened into title. *Chesapeake & O. Ry. Co. v. Hickey* (Ky.) 22 S. W. 441. Et vide *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 551; *Mitchell v. Bridger*, 113 N. C. 63, 18 S. E. 91.

⁵² *Cary v. Holt*, 2 Strange, 1238, 11 East, 70; *Anthony v. Railroad Co.*, 162 Mass. 60, 37 N. E. 780; *Stahl v. Grover*, 80 Wis. 650, 50 N. W. 589. Officer in possession under void process cannot maintain trespass. *Horton v. Hendershot*, 1 Hill, 119.

a third person as a defense.⁵³ Jus tertii is no defense unless the defendant can show that the act complained of was done by the true owner or by his authority.⁵⁴ Thus a "squatter" has such possession as will entitle him to sue a railroad company for crossing his land or disturbing his house, even though situated on its right of way.⁵⁵ Indeed, as to a person not the owner, it is immaterial whether or not the defendant's claim of title is valid, if he has actual possession.⁵⁶ Persons in possession of lands may recover for crops taken away.⁵⁷ So a trespasser may sue a wrongdoer for burning wood he had gathered.⁵⁸ Actual possession of chattels pure and simple will sustain an action of trespass. Thus, a drayman, who, as bailee, had a wagon containing a load of furniture in the street, may recover against one who injured the horse, wagon, and load.⁵⁹ In case of purchase, possession is sufficient, although the title by agreement remains in the vendor.⁶⁰

Possession must be Exclusive.

The possession must, however, be substantially exclusive. Where the basis of the action for trespass is possession de facto, the physical control must extend over the whole subject-matter⁶¹ for which possession is claimed, and must be substantially exclusive.⁶² If two persons are in one field at the same time, and both assert ownership, and neither has title, neither can sue in trespass, because the possession is not exclusive.⁶³

⁵³ Sweetland v. Stetson, 115 Mass. 49; Hoyt v. Gelston, 13 Johns. 141; Aikin v. Buck, 1 Wend. 466; Hanmer v. Wilsey, 17 Wend. 91; Gilson v. Wood, 20 Ill. 38; Tarry v. Brown, 34 Ala. 159; Kemp v. Seely, 47 Wis. 687, 3 N. W. 830.

⁵⁴ Trevillian v. Pyne, 1 Salk. 107; Graham v. Peat, 1 East, 244.

⁵⁵ Witt v. St. Paul & N. P. Ry. Co., 38 Minn. 123, 35 N. W. 862.

⁵⁶ Graham v. Peat, 1 East, 244; Cutts v. Spring, 15 Mass. 135; Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866. Compare Hulse v. Brantley, 110 N. C. 134, 14 S. E. 510.

⁵⁷ Potter v. Lambie, 142 Pa. St. 535, 21 Atl. 888; or destroyed, McClellan v. St. Paul, M. & M. Ry. Co., 58 Minn. 104, 59 N. W. 978.

⁵⁸ Northern Pac. R. Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658.

⁵⁹ Laing v. Nelson, 41 Minn. 521, 43 N. W. 476.

⁶⁰ Fields v. Williams, 91 Ala. 502, 8 South. 808.

⁶¹ Aikin v. Buck, 1 Wend. 466; Coverdale v. Charlton, 3 Q. B. Div. 376.

⁶² Earl of Dartmouth v. Spittle, 19 Wkly. Rep. 444; Ashton v. Stock, 6 Ch. Div. 719.

⁶³ Barnstable v. Thacher, 3 Metc. (Mass.) 239; Reilly v. Thompson, 11 Ir. Com. Law, 238; Tottenham v. Byrne, 12 Ir. Com. Law, 376.

Possession must be Had Animo Possidendi.

"The corporeal act by which possession is acquired must be accompanied by a definite act of the mind, in order to enable possession actually to arise."⁶⁴ Therefore, where one used land which he knew was to have been ultimately dedicated to the public for the use of a street, not under an assertion of ownership, but merely as a dumping ground for refuse from his foundry, there was no possession.⁶⁵

Possession at Time of Wrong, not of Action.

The possession which the law requires is possession at the time of the alleged trespass, not at the time of the commencement of the action.⁶⁶ He must prove such possession. It does not assist the case of the plaintiff, who did not have actual possession at the time of the wrong charged, that subsequently, and before his suit was brought, he corrected an imperfect title or acquired title.⁶⁷ But one who acquires property after levy and before sale may recover in trespass against a sheriff for selling such property as that of another.⁶⁸

195. Constructive possession is either the possession of an agent or servant, or an immediate right to possession, or possession conferred by law in certain cases, independently of any physical apprehension or transfer.

Where there is no actual physical control, or occupancy, possession is determined by title. The occupation of premises by a servant, where there is no intention to possess them in any other way, is that of the owner. Where there is no actual possession, in proof of the right to possess, upon such proof, the law confers possession, independent of physical control.⁶⁹ Thus, a party in pos-

⁶⁴ 2 Sav. Poss. § 21.

⁶⁵ Leigh v. Jack, 5 Exch. Div. 264.

⁶⁶ Williams v. McGrade, 18 Minn. 82 (Gil. 65); Dhein v. Beuscher, 83 Wis. 316, 53 N. W. 551; Scheffel v. Weller, 41 Ill. App. 85.

⁶⁷ Davis v. Elmore, 40 S. C. 533, 19 S. E. 204; Missouri Lumber & Min. Co. v. Zeltinger, 45 Mo. App. 114.

⁶⁸ Kitchen v. McCloskey, 150 Pa. St. 376, 24 Atl. 688.

⁶⁹ Booth v. Sherwood, 12 Minn. 426 (Gil. 310).

session of an inclosed piece of land may have an action for trespass committed on an adjoining unfenced woodland to which he had title.⁷⁰ If two persons are in possession of one field, and each assert ownership, whoever has title can sue in trespass.⁷¹

SAME—DEFENSES.

196. Justification of a trespass may be—

(a) Authority of law in the form of—

- (1) Legal process, civil or criminal; or**
- (2) Otherwise, as abatement of nuisance, distress, necessity, or private defense.**

(b) Consent of owner or possessor, which may be—

- (1) Express or implied;**
- (2) Revocable or irrevocable.**

(c) Property in defendant, which may be—

- (1) An estate in fee, or less estate; or**
- (2) Special property, like easements.**

Authority of Law—Legal Process.

As has been previously seen, authority of law without excess or abuse is a good defense to an action on tort.⁷²

An entry upon the land of another is not a trespass unless it be unjustifiable. It may be justified, among other things, by legal process.⁷³ Civil process of law justifies an officer in breaking in the door of an inner room,⁷⁴ but it does not justify him in breaking the outer door.⁷⁵ "Every man's house is his castle." This is an old expression, and comes down to us from those feudal times when the

⁷⁰ *Penn v. Preston*, 2 Rawle, 14. Compare *Alkin v. Buck*, 1 Wend. 406.

⁷¹ *Jones v. Chapman*, 2 Exch. 803; *Reading v. Royston*, 2 Salk. 423.

⁷² Ante, p. 54.

⁷³ *Breckwoldt v. Morris*, 149 Pa. St. 291, 24 Atl. 300.

⁷⁴ *Williams v. Spencer*, 5 Johns. 352; *Breckwoldt v. Morris*, 149 Pa. St. 291, 24 Atl. 300; *Com. v. Tobin*, 108 Mass. 426. Compare *Jones v. Herron*, 31 Wkly. Notes Cas. 268, with *Dexter v. Alfred*, 64 Hun, 636, 19 N. Y. Supp. 770.

⁷⁵ *Curlewis v. Laurie*, 12 Q. B. 640; *Semayne's Case*, 1 Smith, Lead. Cas. (9th Am. Ed.) 228, 5 Coke, 91a; *Welsh v. Wilson*, 34 Minn. 92, 24 N. W. 327; *B. v. Sheriff of Middlesex*, Y. B. 18 Edw. IV. fol. 4, pl. 4.

grand people lived in large and fortified houses, which were called "castles." In these castles they resisted any entrance except by permission. From this source has come the expression. In accordance therewith, every man's abode, however humble, is his castle; and it is said, "Even though the winds of heaven may blow through it, the king of England cannot enter it."⁷⁶

The reservation, however, extends only to a man's house. It will not be extended to a mill, shop, barn, or outhouse connected with it.⁷⁷ An officer may break into such a building to serve civil process, if his demand for admission is refused.

It was one of the resolutions in *Semayne's Case*⁷⁸ that, "within all cases where the king is party, the sheriff (if the doors be not opened) may break into the party's house, either to arrest him, or to do some other execution of the king's, if otherwise he cannot enter. But before he breaks in, he ought to signify the cause of his coming, and to make request to open the doors." In accordance with this, it is generally recognized that a party's own house is no sanctuary for him against criminal process.⁷⁹ Thus, an officer armed with a search warrant may search for stolen goods, and, if the door of the house be shut, he may break it open, after his demand to open it has been refused, whether the stolen goods are there or not.⁸⁰

Same—Without Legal Process.

The law authorizes entry in some cases irrespective of the actual consent of another, although no legal process be issued. "The law gives authority to enter into a common inn or tavern. So to the lord to distrain * * * to him in reversion, to see if waste be done, or to demand money payable."⁸¹ One of the most important licenses to enter given by law is to go upon adjoining land to abate, without

⁷⁶ *Hammond v. Hightower*, 82 Ga. 290-292, 9 S. E. 1101. Et vide *State v. Armfield*, 2 Hawks, 246.

⁷⁷ *Clark v. Wilson*, 14 R. I. 11.

⁷⁸ 5 Coke, 91a, 1 Smith, Lead. Cas. (9th Am. Ed.) 238.

⁷⁹ *Harvey v. Harvey*, 26 Ch. Div. 644; *Handcock v. Baker*, 2 Bos. & P. 260; *Barnard v. Bartlett*, 10 Cush. 501; *Burdett v. Abbott*, 14 East, 157.

⁸⁰ 2 Hale, P. C. 151; *Chipman v. Bates*, 15 Vt. 51; *Beaty v. Perkins*, 6 Wend. 382; *Allen v. Colby*, 47 N. H. 544.

⁸¹ *Six Carpenters' Case*, 8 Coke, 146a; 3 Bl. Comm. 212; *Newkirk v. Sabler*, 9 Barb. 652.

unreasonable damage, a nuisance, if such abatement can be effected without a breach of the peace.⁸²

Entering on another's lands for the purpose of recapturing goods wrongfully placed there by the trespass of the landowner himself may be justified;⁸³ but this is not true if it cannot be shown how the goods got there, or if it be proved that they were put there by the trespass of a third party.⁸⁴ But there is no implied right of this kind which justifies a breach of the peace, although there is no statute analogous to the statute of forcible entry and unlawful detainer.⁸⁵ Nor may defendant take goods which came lawfully into plaintiff's hands.⁸⁶ Where cattle stray into another's field because of defective fences, the owner is bound to remove them within a reasonable time.⁸⁷

In the same class of justification by law are those cases which necessity constitutes as justification. Thus, where a highway or

⁸² Bac. Abr. "Nuisance," C; 3 Bl. Comm. 5; Rex v. Rosewell, 2 Salk. 459; Burling v. Read, 11 Q. B. 904; Williams v. Spencer, 5 Johns. 352; Ruter v. Foy, 46 Iowa, 132.

⁸³ Patrick v. Colerick, 3 Mees. & W. 483; Chambers v. Bedell, 2 Watts & S. 225; Hartwell v. Kelly, 117 Mass. 235; Spencer v. M'Gowen, 13 Wend. 256.

⁸⁴ 3 Bl. Comm. 4; Anthony v. Haneys, 8 Bing. 186; Blake v. Jerome, 14 Johns. 406; Dixon v. Clow, 24 Wend. 188. Cf. McLeod v. Jones, 105 Mass. 403, with Hartwell v. Kelly, 117 Mass. 235.

⁸⁵ Harding v. Sandy, 43 Ill. App. 442; Salisbury v. Green, 17 R. I. 758, 24 Atl. 787; Richardson v. Anthony, 12 Vt. 273. However, where property is taken away from those in possession, and in good faith claiming possession, forcibly, without authority, and in their presence, they may recapture it without resorting to legal process. State v. Dooley, 121 Mo. 591, 26 S. W. 558; Bobb v. Bosworth (Ky.) Litt. Sel. Cas. 81.

⁸⁶ "If I bail my goods to a man, I cannot justify entering his house to take my goods, for it was by no wrong that they came there, but by the act of us both." 9 Edw. IV. p. 35, pl. 10; Williams v. Morris, 8 Mees. & W. 488; Webb v. Beavan, 6 Man. & G. 1055. But one may enter the close of another to rescue a boat of another cast there by a storm. Proctor v. Adams, 113 Mass. 376.

⁸⁷ "If I drive my beasts along the highway, and you have opened uninclosed land adjoining the highway, and my beasts enter your land and eat the herbage thereof, and I come freshly and chase them out of your land, you shall not have an action against me, for the chasing of them was lawful." 6 Edw. IV. p. 7, pl. 18; Goodwyn v. Cheveley, 4 Hurl. & N. 631; Tillett v. Ward, 10 Q. B. Div. 17; Hartford v. Brady, 114 Mass. 466. Et vide Amstein v. Gardner, 132 Mass. 28; Taft v. New York, P. & B. R. Co., 157 Mass. 297-302, 32 N. E. 168.

way of necessity has become impassable it is for the public's good that people should be allowed to pass over the adjoining land.⁸⁸ Where it is necessary to enter upon the land of another for the preservation of life⁸⁹ or property, as by entry for the purpose of preventing the spread of fire,⁹⁰ necessity is a sufficient excuse. By way of contrast, the right to commit a trespass in pursuit of animals *feræ naturæ* is not now recognized by English or American law.⁹¹ Nor is entry upon another's premises to cut down timber justified simply because it stood close to the line.⁹² Generally, any public authority or direction carries with it an exemption from liability for what is necessary and proper to carry it into effect.⁹³

Abuse of License—Trespass ab Initio.

Abuse, not consisting in mere nonfeasance, of license given by law but not of license given by parties, to enter upon lands, makes one a trespasser *ab initio*.⁹⁴

Where the law authorizes one to enter upon the premises of another, and such person, having entered, abuses that license, he becomes a trespasser *ab initio*. His misconduct relates back so as to make his original entry tortious. In the celebrated *Six Carpenters' Case*,⁹⁵ six carpenters entered an inn and were served with wine, for which they paid. They afterwards asked for more wine, and were supplied with it. This they refused to pay for. They were sued as trespassers *ab initio*. The court laid down the three following rules: (1) Where a man abuses an authority or license given him by law, he becomes a trespasser *ab initio*; (2) where a man abuses an authority or license given him by another party, he may be punished for such an abuse, but he is not a trespasser *ab initio*;

⁸⁸ *Absor v. French*, 2 Show. 28; *Asser v. Finch*, 2 Lev. 234; *Campbell v. Race*, 7 Cush. 408; *Taylor v. Whitehead*, 2 Doug. 745.

⁸⁹ Y. B. 37 Hen. VI. p. 37, pl. 26.

⁹⁰ Per Littleton, J., 9 Edw. IV. p. 35, pl. 10; *American Print Works v. Lawrence*, 23 N. J. Law, 590; *Proctor v. Adams*, 113 Mass. 376.

⁹¹ *Paul v. Summerhayes*, 4 Q. B. Div. 9; *Glenn v. Kays*, 1 Ill. App. 479; *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845.

⁹² *Toledo, St L. & K. C. R. Co. v. Loop*, 139 Ind. 542, 39 N. E. 306.

⁹³ *Southern Bell Telephone & Telegraph Co. v. Constantine*, 9 O. C. A. 359, 61 Fed. 61.

⁹⁴ *Allen v. Crofoot*, 5 Wend. 506. See, also, *Bagshaw v. Gaward*, 1 Yel. 96.

⁹⁵ 8 Coke, 146a, 1 Smith, Lead. Cas. 144.

and (3) a mere nonfeasance cannot make a person who had authority or license given him by law a trespasser ab initio. The doctrine of the case has been repeatedly confirmed.⁹⁶ However, its last rule has been criticised as being merely artificial, and in many cases has been practically disregarded.⁹⁷ But if a landlord, lawfully entering upon premises for the purpose of making a distress, abuse this right, given him by law, by converting the goods to his own use, this would be such a positive wrong, and not the mere omission to do something, as would make him a trespasser ab initio.⁹⁸ In order that a man may be made a trespasser ab initio, where the law has given him the entry, the acts of abuse must be of such a character that there will be continued trespass in the absence of license.⁹⁹

Consent of Owner or Occupant.

The justification of a trespass by the consent of owner or occupant is the logical application to trespass of the familiar principles already considered that no one can object to what he has consented to. The consent of the party may be expressed, or it may be implied. Thus, the license to enter on land may be inferred from entries made in course of friendly visiting extending over a great period of time.¹⁰⁰ It is to be determined by the jury, upon consideration of all the circumstances of the case.¹⁰¹ The consent, however, must be that of the owner and occupant, and not of a third person.¹⁰² One person cannot protect himself by an alleged

⁹⁶ *Oxley v. Watts*, 1 Term R. 12; *Bagshaw v. Goward*, Bull. N. P. 81; *Barnett v. Earl of Guildford*, 11 Exch. 19. And see *Ordway v. Ferrin*, 3 N. H. 69; *Adams v. Rivers*, 11 Barb. 390; *Hale v. Clark*, 19 Wend. 498; *Whitney v. Backus*, 149 Pa. St. 29, 24 Atl. 51; *Wilbur v. Turner*, 39 Ill. App. 526.

⁹⁷ Note to *Barrett v. White* (3 N. H. 210) in 14 Am. Dec. 365.

⁹⁸ *Gargrave v. Smith*, 1 Salk. 221.

⁹⁹ *Taylor v. Jones*, 42 N. H. 25-34; *Stone v. Knapp*, 29 Vt. 501; *Adams v. Rivers*, 11 Barb. 390; *Six Carpenters' Case*, 8 Coke, 146a, 1 Smith, Lead. Cas. (8th Am. Ed.) p. 257.

¹⁰⁰ *Martin v. Houghton*, 45 Barb. 258; *Adams v. Freeman*, 12 Johns. 408.

¹⁰¹ *Lampet v. Starkey*, 10 Coke, 46b. So, under a verbal contract of sale of standing trees to be cut and removed by the purchaser, the law implies a license for the purpose of cutting and removing the same. *Duryea v. Smith*, 62 Hun, 619, 16 N. Y. Supp. 688.

¹⁰² *Gentleman v. Soule*, 32 Ill. 271; *Huling v. Henderson*, 161 Pa. St. 553, 29 Atl. 276.

or actual agreement with another trespasser.¹⁰³ Nor does the instruction of plaintiff's wife to remove household goods justify.¹⁰⁴ Where a party justifies under authority from the individual or authority of law, he must alike show that he acted strictly within the provisions of such authority.¹⁰⁵ An excess of license is a trespass.¹⁰⁶

A license which is not so coupled with an interest as to become a grant is personal as between the parties, and cannot be assigned to a stranger.¹⁰⁷ It is said that there is no such right as a license, falling short of an easement, which is not subject to revocation at will.¹⁰⁸ The holder of a general admission ticket to a theater seems to have only a license revocable at will, and that on ejection the holder must sue on contract.¹⁰⁹ The revocation of a license may either be by express words or by any act "sufficiently signifying the licensor's will. If a man has leave and license to pass through a certain gate, the license is as effectually revoked by locking the gate as by further notice."¹¹⁰ In general, a mere use of land by a licensor in a manner incompatible with the license terminates it without notice.¹¹¹ It is terminated by a transfer of the property¹¹² and by the death of the licensor.¹¹³

¹⁰³ *Hazelton v. Week*, 49 Wis. 661, 6 N. W. 309. Et vide *Olsen v. Upsahl*, 69 Ill. 273; *Williamson v. Fischer*, 50 Mo. 198.

¹⁰⁴ *Burns v. Kirkpatrick*, 91 Mich. 364, 51 N. W. 893; *Galvin v. Bacon*, 11 Me. 28.

¹⁰⁵ *Cate v. Cate*, 44 N. H. 211.

¹⁰⁶ *Capel v. Lyons* (City Ct. N. Y.) 20 N. Y. Supp. 49; *Kissecker v. Monn*, 36 Pa. St. 313; *Riddle v. Brown*, 20 Ala. 412. Cf. *Mills v. Wooters*, 59 Ill. 234.

¹⁰⁷ *Ackroyd v. Smith*, 10 C. B. 164; *Ruggles v. Lesure*, 24 Pick. 187; *Mendenhall v. Kilnck*, 51 N. Y. 246; *De Haro v. U. S.*, 5 Wall. 599.

¹⁰⁸ *Shirley v. Crabb*, 138 Ind. 200, 37 N. E. 130; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Giles v. Simonds*, 15 Gray, 441; *Eckerson v. Crippen*, 110 N. Y. 585, 18 N. E. 443; *Fargis v. Walton*, 107 N. Y. 398, 14 N. E. 303; *Total v. Bonnefoy*, 123 Ill. 653, 14 N. E. 687.

¹⁰⁹ *Wood v. Leadbitter*, 13 Mees. & W. 838; *Hyde v. Graham*, 32 Law J. Exch. 27.

¹¹⁰ *Pol. Torts*, § 308.

¹¹¹ *Simpson v. Wright*, 21 Ill. App. 67; *Wilson v. Railway Co.*, 41 Minn. 56, 42 N. W. 600; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. 149.

¹¹² *Harris v. Gillingham*, 6 N. H. 9; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 2 N. W. 639; *Giles v. Simonds*, 15 Gray, 441.

¹¹³ *Putney v. Day*, 6 N. H. 430; *Carter v. Harlan*, 6 Md. 20.

There is an important distinction between a license and a license coupled with an interest which becomes a grant. "License under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol coupled with a grant is as irrevocable as a deed, provided only that the grant is of a nature capable of being made by parol."¹¹⁴ A license is coupled with an interest where the person obtaining a license to do a thing also acquires a right to the possession and control of the property with which the license is connected. In such cases the authority conferred by the license is not merely a permission, but amounts to a grant, and may be assigned to a third person.¹¹⁵

However, even if the license be not actually coupled with a grant, but be so far executed as to induce the belief that there has been a grant, and the defendant has expended considerable money in making permanent improvements, induced by the silence of the plaintiff to believe the license to be permanent, it has been held to be irrevocable.¹¹⁶ On the other hand, the principle is enforced that a license is revocable even though the licensor permits improvements to be made. This has been applied, for example, to the occupation of "a milling district" by railroad tracks.¹¹⁷

Liberum Tenementum.

The plea "liberum tenementum" (that it is the defendant's land) raises the question of title. A person in possession, even if not legally entitled to it, may have trespass against a wrongdoer, but not against the rightful owner.¹¹⁸

Originally, if a man had a right to the possession of lands, he

¹¹⁴ Johnson v. Skillman, 29 Minn. 95-97, 12 N. W. 149; Miller v. Railroad Co., 6 Hill, 61.

¹¹⁵ Sterling v. Warden, 51 N. H. 217.

¹¹⁶ Feltham v. Cartwright, 5 Blng. N. C. 569; Patrick v. Colerick, 3 Mees. & W. 483; Ruggles v. Lesure, 24 Pick. 187; Smith v. Benson, 1 Hill, 176; Sterling v. Warden, 51 N. H. 217; Long v. Buchanan, 27 Md. 502; Wickersham v. Orr, 9 Iowa, 253; Rhodes v. Otis, 33 Ala. 578; Rerick v. Kern, 14 Serg. & R. 267; Veghte v. Raritan, etc., Co., 19 N. J. Eq. 142.

¹¹⁷ Jackson & Sharp Co. v. Philadelphia, W. & B. R. Co., 4 Del. Ch. 180; Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639; St. Louis National Stock Yards v. Wiggins Ferry Co., 112 Ill. 384; Ketchum v. Newman, 116 N. Y. 422, 22 N. E. 1052.

¹¹⁸ Beddall v. Maitland, 17 Ch. Div. 174; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

might enter and take possession by force of arms. In 1381, by the statute of 5 Rich. II. c. 7, it was provided "that none from henceforth shall make an entry into any lands or tenements but in case where entry is given by the law, and in such case not with a strong hand nor with a multitude of people, but only in a lisible, aisie, and peisable manner." This statute has in substance been re-enacted in all parts of the United States. Therefore, if a claimant of real estate out of possession resorts to force or violence amounting to a trespass of the person, to obtain possession from another claimant who is in peaceable possession, the party using such force and violence is liable in damages, without regard to legal title or right of possession.¹¹⁹ The statute, however, is not inconsistent with the right of the owner of the premises to make peaceable entry without the use of force or intimidation, as by means of a key.¹²⁰ When the rightful owner has also the right of possession, he has the right to enter upon his own land peaceably; and if his entry is resisted by force, he may, it seems, repel force by force, and, although he may be liable civilly and criminally for assault, he is not responsible for damages in trespass.¹²¹

Easement or Special Property.

A person may justify his trespass to land by showing that he has a right of way over such land. This is true of a private right of way only so far as access and use are allowed by the terms of the grant,¹²² or by use.¹²³ In England, a right of way may exist by

¹¹⁹ *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286. But see *Low v. Elwell*, 121 Mass. 309.

¹²⁰ *Livingston v. Webster*, 26 Fla. 325, 8 South. 442; *Lee v. Town of Mound Station*, 118 Ill. 304, 8 N. E. 759; *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12.

¹²¹ *Burling v. Read*, 11 Q. B. 904; *Lyon v. Fairbank*, 79 Wis. 455, 48 N. W. 492; *Hoffman v. Harrington*, 22 Mich. 52; *Hoots v. Graham*, 23 Ill. 81. But see *Ostatag v. Taylor*, 44 Ill. App. 469; *Twombly v. Monroe*, 136 Mass. 464; *Newton v. Harland*, 1 Man. & G. 644; *Frazier v. Caruthers*, 44 Ill. App. 62.

¹²² *Watts v. Kelson*, 6 Ch. App. 169; *United Land Co. v. Great Eastern Ry.*, 10 Ch. App. 586. Compare *Newcomen v. Coulson*, 5 Ch. Div. 133. Where, by deed in 1630, a sufficient way leave was granted to a colliery, the owners were allowed, 200 years afterwards, to adapt the way to the improvements of the age. *Dand v. Kingscote*, 6 Mees. & W. 174, as expressed by Malins, V. C., in 5 Ch. Div. 139. Compare *Finch v. Great Western Ry. Co.*, 5 Exch. Div. 254, with *Skull v. Glenister*, 16 C. B. (N. S.) 81.

¹²³ *Cowling v. Higginson*, 4 Mees. & W. 257; *Williams v. James*, L. R. 2 C. P. 577; *Dare v. Heathcote*, 25 Law J. Exch. 245.

custom in favor of a limited proportion of the public, as a right of way to church in favor of the inhabitants of a particular parish.¹²⁴ No action lies for passing or repassing* on a public way. It is not a trespass to open a swinging window over a street.¹²⁵ If, however, a highway be used for purposes foreign to its dedication, the owner of the fee has constructive possession, so far that he may maintain trespass for such abuse. Thus, trespass will lie on the part of abutting owners for erecting telephone poles on a highway.¹²⁶ So trespass lies for stopping in front of a man's house and using towards him abusive and insulting language.¹²⁷ What would otherwise be a trespass may be justified by various easements of other descriptions.¹²⁸ The right conferred by an easement includes incidentally the privilege to enter upon lands to repair the subject-matter of the easement.¹²⁹

SAME—REMEDIES.

197. Remedies for trespass may be—

- (a) Self-help;
- (b) Injunction;
- (c) Damages.

The remedy for a trespass, as we have seen, may be self-help; as where possession of lands or chattels is regained by force, or a fresh entry is made on a trespasser.

An injunction will be issued by the court, on a proper showing for equitable interference.

There can be no fixed rule whereby damages for trespass will be assessed. The extent of the recovery will vary with the right of the plaintiff. The merest intrusion upon bare possession will entitle at least to nominal damages, without proof of actual harm.¹³⁰

¹²⁴ *Poole v. Huskinson*, 11 Mees. & W. 827.

* *Dovaston v. Payne*, 2 H. Bl. 527.

¹²⁵ *O'Linda v. Lothrop*, 21 Pick. 292.

¹²⁶ *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507.

¹²⁷ *Adams v. Rivers*, 11 Barb. 390. The public have no right of holding public meetings in a public thoroughfare. *Ex parte Lewis*, 21 Q. B. Div. 191.

¹²⁸ To hang drying lines: *Drewell v. Towler*, 3 Barn. & Adol. 735. To dig a ditch: *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. 216.

¹²⁹ *Pomfret v. Ricroft*, 1 Saund. 321.

¹³⁰ Ante, p. 199; Hale, Dam. c. 2.

The measure of the damages will also depend upon the nature of the injury.¹³¹ The ordinary rule is compensation. General damages will be inferred by the law, and special damages, when properly pleaded and proved, may be recovered.

Exemplary damages will be awarded where there are circumstances of outrage, insult, or willful, wanton, and malicious destruction of property.¹³² It would seem that recovery may be had for mental suffering.¹³³ By the statutes of many states, double or treble damages are awarded for willful trespass.

WASTE—DEFINITION.

198. Waste is an injury done or suffered by the owner of the present estate which tends to destroy or lessen the value of the inheritance.¹³⁴

Waste is a wrong depending peculiarly upon the local conditions. To meet these conditions, many statutory changes have been introduced. Modern cases must be construed in connection with such statutes.¹³⁵ Waste, however intimately allied with, is a wrong distinct from trespass and from conversion. It pertains to land only, but trespass may apply to land and personalty; conversion, only to movable property. In both trespass and conversion, the remedy is based on the possession, or right of possession; in waste, the wrong is inflicted by the person in possession.¹³⁶

¹³¹ *Gilbert v. Kennedy*, 22 Mich. 5, per Christiancy, J.

¹³² *Nagle v. Mullson*, 34 Pa. St. 48; *Cutler v. Smith*, 57 Ill. 252; *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854.

¹³³ *Bonelli v. Bowen*, 70 Miss. 142, 11 South. 791.

¹³⁴ *Cooley*, Torts, § 332.

¹³⁵ For illustrations of statutory changes, see *Sullivan v. O'Hara*, 1 Ind. App. 259, 27 N. E. 590; *McIlvain v. Porter* (Ky.) 7 S. W. 309; *Davis v. Clark*, 40 Mo. App. 515; *Curtiss v. Livingston*, 36 Minn. 380, 31 N. W. 357; *University v. Tucker*, 81 W. Va. 621, 8 S. E. 410. Compare *Laws Pa.* 1891, No. 179, p. 208.

¹³⁶ *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. 2; *Cooley*, Torts, § 332.

SAME—KINDS OF WASTE.

199. The gist of waste is the unauthorized wrong to the inheritance, either in the sense of the value or in the sense of destroying the identity.¹³⁷ What conduct amounts to waste is a question of fact. In kind it may be—

- (a) Permissive or commissive; and
- (b) Legal or equitable.

200. Permissive waste is merely passive conduct.

201. Commissive waste is the doing of a willful injury to the premises concerned.

Allowing a house to go to ruin by reason of nonrepair is permissive waste. An action does not lie for such waste against a tenant at will who has not covenanted to repair,¹³⁸ nor against a tenant from year to year.¹³⁹ While there is some doubt on the question, it seems that a tenant for years who has not covenanted to repair is liable for permissive waste.¹⁴⁰ A tenant for life is liable for such waste.¹⁴¹ A dowress is not liable for permissive waste, unless the property involved is such that a prudent owner of the fee would keep in repair to prevent permanent injury to the fee. Therefore, it is not waste to allow buildings used for housing slaves before the emancipation to remain unrepaired thereafter, unless their utility in some other direction be apparent.¹⁴² To suffer a gin mill to be dismantled,¹⁴³ however, is permissive waste. It is also permissive waste to allow a pasture to be overrun with weeds.¹⁴⁴

¹³⁷ Jessel, M. R., in *Jones v. Chappell*, L. R. 20 Eq. 539–542.

¹³⁸ *Harnett v. Maitland*, 16 Mees. & W. 257.

¹³⁹ *Torriano v. Young*, 6 Car. & P. 8; *Martin v. Gilham*, 7 Adol. & E. 540. Indeed, in Kentucky an action at law for permissive waste will not lie. *Smith v. Mattingly*, 96 Ky. 228, 28 S. W. 503.

¹⁴⁰ *Torriano v. Young*, 6 Car. & P. 8; *Herne v. Bembow*, 4 Taunt. 764; *Greene v. Cole*, 2 Saund. 252; *Woodhouse v. Walker*, 5 Q. B. Div. 404.

¹⁴¹ *Yellowly v. Gower*, 11 Exch. 274–294.

¹⁴² *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588.

¹⁴³ *Cannon v. Barry*, 59 Miss. 289.

¹⁴⁴ *Clemence v. Steere*, 1 R. I. 272.

Commissive waste may be committed by tenants at will, for life, for a term of one year, and from year to year. The tendency of American cases is to hold a tenant liable for waste, regardless of the duration or origin of his term.¹⁴⁵ A tenant in dower is undoubtedly liable for commissive waste.¹⁴⁶ The authorities do not agree as to whether a lessee for life or years is liable for waste committed by a stranger. The English authorities seem to think that the lessee is presumed to be capable of preventing it. Therefore the lessor has his action against the lessee for waste, and the lessee has his action of trespass against the wrongdoer.¹⁴⁷ A dowress has been held not liable for waste committed by third persons without her consent.¹⁴⁸ As to the nature of commissive waste, the American authorities are neither in harmony with themselves nor with the English cases. "While our ancestors brought over to this country the principles of the common law, these were nevertheless accommodated to these new conditions."¹⁴⁹ Accordingly, it is a question of fact as to what acts constitute waste, having reference to actually existing conditions, and the finding on such question will not be disturbed on conflicting evidence.¹⁵⁰ It is not waste to use the premises in accordance with good usage and for purposes for which they were manifestly designed. Thus, the unauthorized digging of clay by a tenant is waste, where there is nothing in the situation of the premises or other special circumstances to take the case out of the general rule.¹⁵¹ But, where the works for carrying on the business of making brick have been constructed and established, and the business lawfully undertaken by the owners of the land, it is not waste for a tenant to continue the business in the customary way.¹⁵² On the same principle, while a tenant may not open new or discontinued mines or quarries,¹⁵³ yet he may

¹⁴⁵ *Boefer v. Sheridan*, 42 Mo. App. 226.

¹⁴⁶ *Cooley*, Torts, § 333; 1 *Scrib. Dower*, 212-214; 2 *Scrib. Dower*, 795.

¹⁴⁷ *Ball*, Torts, 59; *Regan v. Luthy* (Com. Pl.) 11 N. Y. Supp. 709.

¹⁴⁸ *Willey v. Laraway*, 64 Vt. 559, 25 Atl. 436.

¹⁴⁹ *Gaston, J.*, in *Shine v. Wilcox*, 1 Dev. & B. Eq. 631.

¹⁵⁰ *Jackson v. Brownson*, 7 Johns. 227.

¹⁵¹ *Livingston v. Reynolds*, 2 Hill, 157.

¹⁵² *Russell v. Merchants' Bank of Lake City*, 47 Minn. 286, 50 N. W. 228. Compare *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

¹⁵³ *Gaines v. Green Pond Iron Min. Co.*, 32 N. J. Eq. 86. If coal has been

exhaust mines and quarries opened at the commencement of the estate without committing waste.¹⁵⁴ As to the use of soil in husbandry, it was originally held that any conversion of land from one species to another, as plowing up woodland, or turning arable into pasture land, was waste; but modern authorities do not bear this out.¹⁵⁵ Whether such conversion interferes with the value as a whole, and the sanction of similar usage by good farmers, are proper considerations for the jury.¹⁵⁶ Putting all the land into wheat may be waste; so may negligence to observe the proper rotation of crops.¹⁵⁷ The exhaustion of the soil may be waste,¹⁵⁸ although mere bad farming is not.¹⁵⁹ Commissive waste may affect timber and other products grown on land. With regard to such products the law will depend largely on the local custom and on the peculiar condition of the country in which the question may arise. While, in England, outside of local usage, the tenant could take wood for ordinary use, as for fuel or for repair, he would be liable for waste if he exceeded what was reasonable.¹⁶⁰ In this country, cutting valuable forest trees where there is little woodland on a farm may be waste;¹⁶¹ but it is not waste to cut timber for necessary repair,—for example, to fence.¹⁶² “Any such strictness as existed in England would be manifestly unsuited to the condition of things in other parts of this country, because it would be of some service to the inheritance. In newer states, where timber is abundant, it might indeed be beneficial to the inheritance, rather than wasteful, to permit the timber to be removed; and therefore

mined for domestic use, the life tenant may not mine for sale. *Franklin Coal Co. v. McMillan*, 49 Md. 549.

¹⁵⁴ *Sayers v. Hoskinson*, 110 Pa. St. 473, 1 Atl. 308; *Grubbs' Appeal*, 90 Pa. St. 228.

¹⁵⁵ Pol. Torts, 285.

¹⁵⁶ *Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874.

¹⁵⁷ *Wilds v. Layton*, 1 Del. Ch. 226.

¹⁵⁸ *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601.

¹⁵⁹ *Richards v. Torbert*, 3 Houst. (Del.) 172.

¹⁶⁰ 2 Bl. Comm. 35; 1 Washb. Real Prop. 129.

¹⁶¹ *Powell v. Cheshire*, 70 Ga. 357; *Huddleston v. Johnson*, 71 Wis. 836, 37 N. W. 407.

¹⁶² *Calvert v. Rice*, 91 Ky. 533, 16 S. W. 351. Compare *Den v. Kinney*, 5 N. J. Law, 634.

what is wasteful elsewhere might in these sections of the country be permissible.”¹⁶³ It is not waste for the life tenant to cut wood or timber so as to fit the land for cultivation or pasture conformable to the rules of good husbandry; and this is so even where the wood or timber so cut is sold, used, or consumed on the premises.¹⁶⁴ But the mere fact that the value of the land is not diminished, or that it may be increased, is no defense in an action for actual waste.¹⁶⁵

It is waste to pull down houses, outbuildings, or walls, to remove wainscots or floors, to build up old windows or doors, or to open new ones, or to change one species of building into another,—as a water mill into a wind mill, or a corn mill into a malt mill.¹⁶⁶ The tearing down of a house is waste, even if it be done for the purpose of erecting a better one.¹⁶⁷

202. Legal waste is a term used to describe waste for which there lay a remedy at law. Equitable waste is a term used to describe waste which was only recognized as such and relieved against in equity.

Though a life estate is given “without impeachment of waste,” the tenant for life will still be restrained from committing wanton or malicious waste, such as damaging and destroying buildings or boundary walls, cutting down wood unfit for timber, or trees grown for shelter or ornament, or destroying a field by carrying away brick earth.¹⁶⁸ Such waste is called equitable waste. The words “to have and to hold, and to use and control as the lessee thinks

¹⁶³ Cooley, Torts, 333; *King v. Miller*, 99 N. C. 583, 6 S. E. 680; *McGregor v. Brown*, 10 N. Y. 114.

¹⁶⁴ *Keeler v. Eastman*, 11 Vt. 293; *Williard v. Williard*, 56 Pa. St. 119; *Appeal of Campbell*, 2 Doug. (Mich.) 141; *Van Densen v. Young*, 29 N. Y. 9; *Schnebly v. Schnebly*, 26 Ill. 116; *Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527.

¹⁶⁵ *Rossman v. Adams*, 91 Mich. 69, 51 N. W. 685; *Moses v. Johnson*, 88 Ala. 517, 7 South. 146.

¹⁶⁶ *Smyth v. Carter*, 18 Beav. 78; *Ball, Cas. Torts*, 57.

¹⁶⁷ *Dooly v. Stringham*, 4 Utah, 107, 7 Pac. 405.

¹⁶⁸ *Vane v. Barnard*, 2 Vern. 738; *Bishop of London v. Web*, 1 P. Wms. 528; *Marquis of Downshire v. Sandys*, 6 Ves. 107; 2 Bl. Comm. 282.

proper, for his benefit during his natural life," import a lease without impeachment for waste. But such words are not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which in law might be waste. Such a lease does not permit the tenant to entirely strip the land of timber, convert it into lumber, and sell it away from the inheritance.¹⁶⁹

SAME—REMEDIES.

203. The ordinary remedies for waste are

- (a) An award of damages, or**
- (b) The issuance of an injunction against the recurrence of mischief.**

Damages.

The actual damages, where recovery is allowed, are meted out on the same principles which would govern recovery in trespass, and in proportion to the injury sustained.¹⁷⁰ One can recover only such damages as affect his expectant estate, and, in general, these damages are the amount the estate is diminished thereby in value.¹⁷¹ The damage may be recovered against a mortgagor or his vendee for acts of waste committed with a knowledge that the value of the security will be injured thereby,¹⁷² even though in its damaged condition it is of sufficient value to satisfy the mortgage debt.¹⁷³ Double or treble damages are often awarded by statute.

Injunction.

The issuance of an injunction to prevent the commission or continuance of waste is governed by ordinary equitable principles. A court of equity will not interfere to prevent by injunction permissive waste, but will leave the aggrieved party to his remedy at law.¹⁷⁴ Nor will it grant an injunction against ameliorating or im-

¹⁶⁹ *Duncombe v. Felt*, 81 Mich. 332, 45 N. W. 1004.

¹⁷⁰ 3 Suth. Dam. § 1033; *Van Deusen v. Young*, 29 N. Y. 9.

¹⁷¹ 3 Suth. Dam. § 1034, note 4; *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322.

¹⁷² *Van Pelt v. McGraw*, 4 N. Y. 110; *Wilson v. Maltby*, 59 N. Y. 126-129.

¹⁷³ *Bryom v. Chapin*, 113 Mass. 308.

¹⁷⁴ *Powys v. Blagrove*, 4 De Gex, M. & G. 448.

proving waste, as building a valuable house on the land.¹⁷⁵ In general, it will not issue unless the injury is so irreparable that damages would afford no adequate compensation.

CONVERSION—DEFINITION.

204. Conversion is an unauthorized act which deprives another of his property, permanently or for an indefinite time.

The law of conversion was to a great extent developed through the common-law action on the case, "trover." The question which was originally asked was, not whether there was the substantive wrong, conversion, in a given instance, but whether trover would lie. Indeed, the remedy and the wrong are now alike commonly referred to as "trover and conversion."

The action of trover, according to the original form of declaration, was applicable only to cases where the plaintiff had lost his goods and they were subsequently found and appropriated by the defendant. Even under common-law practice and pleading, the averments of loss and finding have long been considered immaterial, and are not traversable by the defendant.¹⁷⁶ Even in jurisdictions where the code system of pleading is in force, the name is still applied to the action brought to recover the legal measure of damages for personal chattels wrongfully converted.

Trespass and trover, while distinct forms of action, may in many instances lie for the same wrong, at the plaintiff's option. They have become largely, if not wholly, interchangeable¹⁷⁷ as to injuries

¹⁷⁵ *Doherty v. Allman*, 3 App. Cas. 709. Compare *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750.

¹⁷⁶ Clerk & L. Torts, 167. The origin of trover, its distinction from other forms of common-law actions, and its justification, will be found set forth in *Burroughes v. Bayne*, 5 Hurl. & N. 296; especially by Martin, B. *England v. Cowley*, L. R. 8 Exch. 126; *Hlort v. Bott*, L. R. 9 Exch. 86.

¹⁷⁷ As to distinctions between trespass and trover, see *Shea v. Inhabitants of Milford*, 145 Mass. 525, 14 N. E. 769; *Downs v. Finnegan*, 58 Minn. 112, 59 N. W. 981; *Stanley v. Gaylord*, 1 Cush. 536-553; *Thorogood v. Robinson*, 6 Q. B. 769; *Bushel v. Miller*, 1 Strange, 128; *Farnsworth v. Lowery*, 134 Mass. 512.

to personal property.¹⁷⁸ The fundamental distinction between them is founded on this: Trespass is essentially a wrong to the actual possessor; conversion is a wrong to the person entitled to immediate possession. The actual possessor is frequently, but not always, the person entitled to immediate possession. So that trover sometimes may, but does not necessarily, include trespass.

SAME—TITLE TO MAINTAIN.

205. To entitle him to recover in trover and conversion, the plaintiff or his assignor must have had at the time of the alleged wrong

- (a) Property, general or special, entitling him to immediate possession; or**
- (b) Actual possession.**

To recover in trover, plaintiff must show possession in fact, or the right to recover possession. The wrong is not done to the thing itself, but to the abstract right to the thing. The plaintiff, accordingly, must allege and prove possession or right of possession at the time of the alleged wrong; not indefinitely or, for example, at the time of the commencement of the action.¹⁷⁹ Absolute ownership of chattels—the right of general property—is said to draw to it the right of possession.¹⁸⁰ This would seem to mean no more than that ownership confers the right to take possession. Therefore one in whom is vested absolute property in a chattel may maintain trover against one who interferes with it, although he has never had possession in fact.¹⁸¹ Constructive possession is sufficient.¹⁸²

¹⁷⁸ Trover will not lie for an injury to real estate. But a building may be converted. *Osborn v. Potter*, 101 Mich. 300, 59 N. W. 606.

¹⁷⁹ *Gordon v. Harper*, 7 Term R. 9; *Bradley v. Copley*, 1 C. B. 685; *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924; *McLaughlin v. Waite*, 9 Cow. 670.

¹⁸⁰ *Lexington & O. Ry. Co. v. Kidd*, 7 Dana, 245; *Abercrombie v. Bradford*, 16 Ala. 560-567.

¹⁸¹ *Ball*, Torts, 70; *Gordon v. Harper*, 7 Term R. 9, 2 Saund. 47a, note 1; *Ayer v. Bartlett*, 9 Pick. 156.

¹⁸² *Bristol v. Burt*, 7 Johns. 254; *McCombie v. Davies*, 6 East, 540.

There are, however, many kinds of special property, not amounting to absolute ownership, which are sufficient to entitle one to recover for conversion. Special property denotes the possession of one who has a qualified interest; and it is sometimes added to one who has only bare possession. Where a person relies on special property, there must, ordinarily, be adduced evidence of possession. Possession is not annexed to it by a construction of law.¹⁸³ Bare possession, as of a finder, gives sufficient right to maintain trover.¹⁸⁴ The possession of chattels is, in general, *prima facie* evidence of property, and of a right to their possession, if not against all who cannot show a better title, at least against all who rely on an inferior one.¹⁸⁵ As between the finder and one who claims the chattel as owner, the former may retain the property a reasonable length of time to satisfy himself whether the claimant is the owner.¹⁸⁶

Few things in law, it is said, are more difficult to determine than what is a sufficient right of property to support trover or replevin.¹⁸⁷ The defendant cannot succeed by setting up the title of a third person, unless he can so connect himself with such third person as to claim title under him.¹⁸⁸ Accordingly, he is driven to defending his right to the property, and to attacking that of the plaintiff. The respective rights of possession of defendant and plaintiff vary from those of an absolute owner to those of a thief. To illustrate, it seems clear that the owner of personal property leased to another cannot maintain trover for a conversion pending the demise.¹⁸⁹ A vendor may deliver personal property under a conditional sale, reserving title in himself, and under such an agreement regain possession, without becoming liable in conversion. And he has been allowed to recover in trover against such vendee

¹⁸³ 2 Greenl. Ev. § 637, note 2 et seq.; *Clark v. Draper*, 19 N. H. 419.

¹⁸⁴ *Armory v. Delamirie*, 1 Strange, 505.

¹⁸⁵ *Adams v. McGlinchy*, 66 Me. 474; *Gilson v. Wood*, 20 Ill. 38.

¹⁸⁶ *Isack v. Clarke*, 1 Rolle, 130; *Clark v. Chamberlain*, 2 Mees. & W. 78.

¹⁸⁷ 1 Smith, Lead. Cas. (8th Am. Ed.) pt. 1, p. 690.

¹⁸⁸ *Jeffries v. Great Western Ry. Co.*, 5 El. & Bl. 802-805; *Biddle v. Bond*, 34 Law J. Q. B. 137; *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360; *Steele v. Schricker*, 55 Wis. 134, 12 N. W. 396; *Brown v. Shaw*, 51 Minn. 266, 53 N. W. 633.

¹⁸⁹ *Gordon v. Harper*, 7 Term R. 9; 1 Chit. Pl. 152; 2 Greenl. Ev. § 640.

for disposing of it without his consent,¹⁹⁰ and against third persons purchasing it with knowledge of the terms under which the vendee held it.¹⁹¹ But such third persons are not liable to the vendee under such circumstances.¹⁹² A bailee, pledgee, mortgagee, or holder of other special interest has sufficient property to enable him to recover the full value of the personal property as against a stranger to the title; but he must account to the general owner for the surplus recovered beyond the value of his own interest.¹⁹³ As against the general owner, or one in privity with the general owner, he can recover only the value of his special property. On the other hand, abuse by the bailee of his special property renders him liable in conversion to its owner. The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of conversion; and so is the auctioneer who refuses to deliver it up unless expenses incurred be first paid.¹⁹⁴ Trover will not lie against a mortgagee for repossessing himself of the goods on condition broken by mortgagor.¹⁹⁵ An action will lie by a mortgagee against the mortgagor or his privies for removing the chattels mortgaged, whether the mortgage is due or not.¹⁹⁶

SAME—THE UNAUTHORIZED ACT.

206. The act of conversion is the distinct, unauthorized, and positive assumption of the powers of a true owner.

207. Neither the benefit to defendant resulting from the act, nor ordinarily the motive inducing it, but the loss to plaintiff, is the basis of the wrong.

¹⁹⁰ *Watson v. Goodno*, 66 Vt. 229, 28 Atl. 987.

¹⁹¹ Cf. *Smith v. Wood*, 63 Vt. 534, 22 Atl. 575.

¹⁹² A person who pays for putting designs on a lithographic stone, title to which is agreed to be in the printer, cannot sue third persons for its conversion. *Knight v. Sackett & Wilhelms Lith. Co.*, 141 N. Y. 404, 36 N. E. 392.

¹⁹³ *Falola v. Manning*, 35 Mo. 271; *Atkins v. Moore*, 82 Ill. 240; *Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo*, 60 N. Y. 40; *Hale*, Bailm. pp. 58, 89, 196, 214.

¹⁹⁴ *Loeschman v. Machin*, 2 Starkie, 311.

¹⁹⁵ *First Nat. Bank of Colorado Springs v. Wilbur*, 16 Colo. 316, 26 Pac. 777; *Hanson v. Tarbox*, 47 Minn. 433, 50 N. W. 474.

¹⁹⁶ *Gill v. Weston*, 110 Pa. St. 312, 1 Atl. 921.

208. The fact of wrongful assumption of dominion, when established, entitles the owner or possessor to recover in trover, despite his subsequent dealings with the property not amounting to a legal discharge.

Every distinct act of dominion exerted over property in denial of the owner's right or inconsistent therewith amounts to conversion.¹⁹⁷ By an act of dominion is meant an act tantamount to an exercise of ownership.¹⁹⁸ Mere assertion of ownership would not seem to be sufficient.¹⁹⁹ The act must be unauthorized. If it is done in accordance with authority of law, whether process of law or otherwise,²⁰⁰ or with the consent of the party,²⁰¹ it is no wrong. The act must be a positive tortious act. A merely passive defendant cannot be guilty of conversion.²⁰² Nonfeasance or neglect of legal duty, as a mere failure to perform an act made obligatory by contract or by which property is lost to the owner, does not constitute conversion.²⁰³ Thus, a bailee is not liable in trover for loss of property through larceny from him, or because of negligence resulting in its destruction.²⁰⁴ Indeed, it is doubtful whether a

¹⁹⁷ See *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Bristol v. Burt*, 7 Johns. 254; *Frome v. Dennis*, 45 N. J. Law, 515; *Webber v. Davis*, 44 Me. 147-152; *Nichols v. Newsom*, 2 Murph. (N. C.) 302; *Miller v. Baker*, 1 Metc. (Mass.) 27; *Forbes v. Railroad Co.*, 133 Mass. 154; *Spooner v. Manchester*, Id. 270; *Pease v. Smith*, 61 N. Y. 477; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445; *Johnson v. Farr*, 60 N. H. 426; *Reeve v. Fox*, 40 Ill. App. 127.

¹⁹⁸ Bigelow, Torts, 184.

¹⁹⁹ *Burnside v. Twitchell*, 43 N. H. 390.

²⁰⁰ *Stevens v. Curtis*, 18 Pick. 227. And see *Wilson v. McLaughlin*, 107 Mass. 587; *Bonney v. Smith*, 121 Mass. 155; *Tobin v. Deal*, 60 Wis. 87, 18 N. W. 634. Necessity may be justification, as throwing goods over in a storm. *Bird v. Astcock*, 2 Bulst. 280; *Drake v. Shorter*, 4 Esp. 165; *Perkins v. Ladd*, 114 Mass. 420.

²⁰¹ *Hills v. Snell*, 104 Mass. 173.

²⁰² *Ragsdale v. Williams*, 8 Ired. 498; *Farrar v. Rollins*, 37 Vt. 295; *Biel v. Horner*, 9 Misc. Rep. 492, 30 N. Y. Supp. 227.

²⁰³ *Sturges v. Keith*, 57 Ill. 451; *Dame v. Dame*, 38 N. H. 429; *Rogers v. Hule*, 2 Cal. 571; *Bowlin v. Nye*, 10 Cush. 416; *Ragsdale v. Williams*, 8 Ired. 498; *Devereux v. Barclay*, 2 Barn. & Ald. 702.

²⁰⁴ *Ross v. Johnson*, 5 Burrows, 2825; *Packard v. Getman*, 4 Wend. 613; *Mulgrave v. Ogden*, Cro. Eliz. 219.

person already in possession can commit the wrong of conversion by any act of interference limited to a special purpose, and falling short of the total assumption of the powers of a true owner, and depriving such owner of all beneficial use of the property.²⁰⁵

Violation of Absolute Duty.

It is not necessary to show advantage on the part of the defendant. The property need not have been converted to his own use; deprivation on the part of the plaintiff is sufficient.²⁰⁶ As has been seen, the duty to respect the property and possession of another is absolute. One is not excused by showing, for example, that he was not personally guilty of intentional fraud,²⁰⁷ or that he acted under an honest but mistaken idea of title.²⁰⁸ The duty to respect property, however, is not so absolute as entirely to disregard the intention of the defendant. It has been held by the highest authorities that, when the act done is equivocal in its nature, there must be an intention of the defendant to take to himself the property in the goods, or to deprive plaintiff of it, to make him liable for conversion.²⁰⁹ The absence of an improper motive, however, while not ordinarily a matter of justification, may materially affect the measure of plaintiff's damage.²¹⁰

²⁰⁵ *England v. Cowley*, L. R. 8 Exch. 126.

²⁰⁶ *Perkins v. Smith*, 1 Wils. 328; *Parker v. Godin*, 2 Strange, 813; *Hlort v. Bott*, L. R. 9 Exch. 86, and cases post, p. 410, note 218; *Stephens v. Elwall*, 4 Maule & S. 259; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Youl v. Harbottle*, Peake, 68.

²⁰⁷ *Bonaparte v. Clagett*, 78 Md. 87, 27 Atl. 619.

²⁰⁸ *Waverly Timber & Iron Co. v. St. Louis Cooperage Co.*, 112 Mo. 383, 20 S. W. 566; *Sprights v. Hawley*, 39 N. Y. 441; *Wilson v. Hoffman*, 93 Mich. 72, 52 N. W. 1037; *Kenney v. Ranney*, 96 Mich. 617, 55 N. W. 982.

²⁰⁹ *Simmons v. Lillystone*, 8 Exch. 431; *Fouldes v. Willoughby*, 8 Mees. & W. 540. Post, pp. 415, 416. Thus, if a person who hires a horse to drive to a particular place, by mistake takes the wrong road, and on such discovery returns by a circuit through another town, he is not liable in trover for conversion of the horse. *Spooner v. Manchester*, 133 Mass. 270; *Shea v. Milford*, 145 Mass. 525, 14 N. E. 769.

²¹⁰ *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476; *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398.

• *Subsequent Dealings with Property.*

The subsequent offer to return, or the subsequent recovery or return, of the property wrongfully converted by another, or its proceeds, in part or whole, does not extinguish the owner's right of action against the wrongdoer,²¹¹ but operates only by way of mitigating damages.²¹² A judgment in trover does not vest the title of the property in the defendant, unless such judgment be for the value of the property,—not for merely nominal damages,—and is followed by satisfaction.²¹³ The owner may, however, treat the transaction as a sale, and, by waiving the tort, maintain an action *ex contractu*. The effect of this would be to pass title.²¹⁴

209. An act of conversion is committed when one of the following circumstances exists, or more than one concur:

- (a) **When the property is wrongfully taken;**
- (b) **When it is wrongfully parted with;**
- (c) **When it is wrongfully retained;**
- (d) **When it is wrongfully destroyed.**

Taking Property.

The fiction of finding, as an essential of trover, has been abolished. "It is not material whether the tenant got possession lawfully, or unlawfully. In the latter case he waives the trespass and admits the possession to have been lawfully gotten, when he sues in trover."²¹⁵ Taking may constitute the act of conversion.²¹⁶ "Any

²¹¹ *Robinson v. Lewis*, 6 Misc. Rep. 37, 23 N. Y. Supp. 1004; *Carpenter v. American Bldg. & Loan Ass'n*, 54 Minn. 403, 56 N. W. 95, 577.

²¹² *Williams v. Archer*, 5 C. B. 318; *Gibbs v. Chase*, 10 Mass. 125; *Brewster v. Silliman*, 38 N. Y. 423. On tender, owner is not bound to receive property converted. *Higgins v. Whitney*, 24 Wend. 379. See Hale, Dam. p. 114; Hale, Bailm. p. 193.

²¹³ *Singer Manuf'g Co. v. Stillman*, 52 N. J. Law, 263, 19 Atl. 260; *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760; *Thurst v. West*, 31 N. Y. 210; *Lovejoy v. Murray*, 3 Wall. 1-16; *Parmalee v. Loomis*, 24 Mich. 242.

²¹⁴ *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272; *Kalckoff v. Zoehrlaut*, 40 Wis. 427; *Moore v. Hill*, 62 Vt. 424, 19 Atl. 997.

²¹⁵ Lord Mansfield, in *Cooper v. Chitty*, 1 Burrows, 20-31.

²¹⁶ The very act of taking goods from one who has no right to dispose of

asportation of a chattel, for the use of the defendant or a third person, amounts to a conversion, for this simple reason: that it is an act inconsistent with the general rights of dominion, which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is conversion."²¹⁷ An actual taking away is not always necessary. Thus, if an officer levy on a wood pile as the property of another, taking it under his control and into his custody so far as possible, this is such an exclusion of the lawful owner as will constitute conversion.²¹⁸ However, the mere assertion of a pretended right by one not in possession, nor entitled to an immediate possession, of property, or the threatening by such a person to prevent the true owner from dealing with his property, though it may be a cause of action if it results in special damages, is not conversion. Cases in which taking is the sole element of conversion are not common. Ordinarily other elements of conversion concur.

Parting with Property.

One of the most common exercises of dominion, unequivocally indicating an assumption of title, is a sale of a chattel without the authority of the owner.²¹⁹ There is liability for a sale under mistake of ownership. "The very assuming to one's self the property and right of disposing of another man's goods is a conversion."²²⁰ An officer is liable for the wrongful sale of property,²²¹ and also

them is in itself a conversion. Both the person who takes and the person who disposes are liable. *Hurst v. Gwennap*, 2 Starkie, 306; *Thacher v. Moors*, 134 Mass. 156-167; post, p. 415, note 263; *M'Comble v. Davies*, 6 East, 538; *Mallalieu v. Laugher*, 3 Car. & P. 551; *Spackman v. Foster*, 11 Q. B. Div. 99; *Wellington v. Wentworth*, 8 Metc. (Mass.) 548.

²¹⁷ *Fouldes v. Willoughby*, 8 Mees. & W. 540. Cf. *Coles v. Wright*, 4 Taunt. 198.

²¹⁸ *Molm v. Barton*, 27 Minn. 530, 8 N. W. 765; *Johnson v. Farr*, 60 N. H. 426; *M'Comble v. Davies*, 6 East, 538; *England v. Cowley*, L. R. 8 Exch. 126; *Traylor v. Horrall*, 4 Blackf. 317.

²¹⁹ *Fette v. Lane* (Cal.) 37 Pac. 914.

²²⁰ *Baldwin v. Cole*, 6 Mod. 212, cited in *M'Comble v. Davies*, 6 East, 538; *Spackman v. Foster*, 11 Q. B. Div. 99.

²²¹ *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997; *Freeman v. Grant*, 132 N. Y. 22, 30 N. E. 247.

the party at whose instance the officer makes the wrongful sale.²²² An attempt to sell is sufficient.²²³ Forms of parting with property other than by sales may amount to conversion; as delivery of goods by bailee to officers under an illegal attachment, or to another person after notice of the claim of the true owner, or under mistake.²²⁴

Retaining Property.

Mere retention of the property of another in violation of his right may constitute conversion.²²⁵ Thus, claiming a lien on,²²⁶ or mingling special with general, deposits,²²⁷ or locking up a building containing chattels bought by another,²²⁸ may be conversion. On the other hand, for example, mere delay in transportation is not a sufficient retention to constitute conversion,²²⁹ nor the negligent keeping of what a man has found.²³⁰ Demand and refusal, before commencement of an action,²³¹ while they do not in themselves constitute conversion, may be necessary to show conversion when other conduct fails to show it,²³² and are prima facie but not conclusive evidence of conversion.²³³ Notwithstanding many loose sayings to

²²² Kane v. Hutchisson, 93 Mich. 488, 53 N. W. 624.

²²³ Dickey v. Franklin Bank, 32 Me. 572. But see Donald v. Suckling, L. R. 1 Q. B. 585.

²²⁴ Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209; Phillips v. Brigham, 26 Ga. 617. Cf. Clegg v. Warehouse Co., 149 Mass. 454, 21 N. E. 877; Lavery v. Snethen, 68 N. Y. 522 (Disposal by agent of property of principal).

²²⁵ Osborn v. Potter, 101 Mich. 300, 59 N. W. 606. A township treasurer wrongfully retaining funds is guilty of conversion. Monroe v. Whipple, 56 Mich. 516, 23 N. W. 202.

²²⁶ Jacoby v. Laussatt, 6 Serg. & R. 300.

²²⁷ Moving and shipping wheat, Phillip Best Brewing Co. v. Pillsbury & Hurlbut Elevator Co., 5 Dak. 62, 37 N. W. 763.

²²⁸ Hughes v. Coors, 3 Colo. App. 303, 33 Pac. 77.

²²⁹ Briggs v. Railway Co., 28 Barb. 515.

²³⁰ Mulgrave v. Ogden, Cro. Eliz. 219; Burroughes v. Bayne, 5 Hurl. & N. 296.

²³¹ Cross v. Barber, 16 R. I. 266, 15 Atl. 69; Boardman v. Gill, 1 Camp. 410, note.

²³² Demand, Nixon v. Jenkins, 2 H. Bl. 135; Castle v. Corn Exch. Bank, 75 Hun, 89, 26 N. Y. Supp. 1035; refusal, Severin v. Keppel, 4 Esp. 150; Holbrook v. Wight, 24 Wend. 169.

²³³ Anon. (Holt, C. J.) 12 Mod. 344; Esmay v. Fanning, 9 Barb. 176; Singer

the contrary they are not the only evidence of conversion.²³⁴ Thus, such refusal does not prove conversion if the party has not the power of compliance.²³⁵ The demand must be unconditional.²³⁶

Demand is not, however, always necessary; as where the taking is tortious, where there has been an actual conversion of the property,²³⁷ where there has been refusal before demand,²³⁸ or where the purchase of goods has been effected through the fraud of the vendee.²³⁹ The refusal, ordinarily, must also be unconditional.²⁴⁰ The substance of the refusal is the denial of title.²⁴¹ Where the refusal is qualified the jury, under proper instructions from the court, passes on the reasonableness of the qualification.²⁴² A refusal has been held not to constitute conversion, where defendant assigned as a reason his inability to deliver the property.²⁴³ Non-compliance on demand may be sufficient refusal.²⁴⁴

Manuf'g Co. v. King, 14 R. I. 511; *Osborn v. Potter*, 101 Mich. 300, 59 N. W. 606; *Duggan v. Wright*, 157 Mass. 228, 32 N. E. 159; *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548.

²³⁴ *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476.

²³⁵ *Smith v. Young*, 1 Camp. 439; *Frome v. Dennis*, 45 N. J. Law, 515; *England v. Cowley*, L. R. 8 Exch. 126; *Featherstonhaugh v. Johnston*, 8 Taunt. 237; *Spackman v. Foster*, 11 Q. B. Div. 99; *Dearbourn v. Union Nat. Bank*, 58 Me. 273; *Packard v. Getman*, 4 Wend. 613.

²³⁶ *Rushworth v. Taylor*, 3 Q. B. 699.

²³⁷ *Forsdick v. Collins*, 1 Starkie, 173; *Edgerly v. Whalan*, 106 Mass. 307; *Rice v. Yocum*, 155 Pa. St. 538, 26 Atl. 698; *Taylor v. Lyon* (Pa. Sup.) 13 Atl. 739; *Baker v. Lothrop*, 155 Mass. 376, 29 N. E. 643; *Follett v. Edwards*, 30 Ill. App. 386.

²³⁸ *First Nat. Bank v. Kickbusch*, 78 Wis. 218, 47 N. W. 267.

²³⁹ *Thurston v. Blanchard*, 22 Pick. 18; *Green v. Russell*, 5 Hill. 183; *Yeager v. Wallace*, 57 Pa. St. 365; *Gregory v. Fichtner* (Com. Pl.) 14 N. Y. Supp. 891.

²⁴⁰ See *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791; *Singer Manuf'g Co. v. King*, 14 R. I. 511; *Green v. Dunn*, 3 Camp. 215, note; *Vaughan v. Watt*, 6 Mees. & W. 492. Cf. *Lee v. Bayes*, 18 C. B. 599; *Zachary v. Pace*, 9 Ark. 212; *Fletcher v. Fletcher*, 7 N. H. 452; *Ball v. Liney*, 48 N. Y. 6. But see *Thorogood v. Robinson*, 6 Q. B. 769.

²⁴¹ *Williams v. Smith*, 153 Pa. St. 462, 25 Atl. 1122.

²⁴² *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Alexander v. Southey*, 5 Barn. & Ald. 247. Et vide *Ingalls v. Bulkley*, 15 Ill. 224; *Mount v. Derick*, 5 Hill, 455.

²⁴³ *Donlin v. McQuade*, 61 Mich. 275, 28 N. W. 114.

²⁴⁴ *Davis v. Nicholas*, 7 Car. & P. 339.

Destruction of Property.

When property is wrongfully dealt with, so that its identity is destroyed, it is converted. Thus, a railroad company which kills and uses the animal of another is liable in trover, whether the killing be negligent or not.²⁴⁵ To apply any process of manufacture to raw material without the authority of the owner of such material may constitute conversion.²⁴⁶ The adulteration of liquor destroys its identity, and may be the basis of an action of trover.²⁴⁷ It is said, however, that if the chattel continues to exist as such, any injury done to it is a trespass, and nothing more. Thus, where the one had sawed a log of timber, the owner thereof could not recover in conversion.²⁴⁸ So improperly driving a horse²⁴⁹ may be conversion. On the other hand, mere destruction of property while in the bailee's hands does not constitute conversion; as where it is accidentally burned.²⁵⁰

SAME—PARTIES.

210. The parties to the wrongful assumption of ownership involved in conversion are governed by ordinary principles, except, especially, as to cases of
- (a) Joint ownership.
 - (b) Performance of a ministerial duty.

The law as to disabilities is the same in trover as in other torts. A principal is liable for conversion by his servant.²⁵¹ One who in-

²⁴⁵ *Atchison, T. & S. F. R. Co. v. Tanner*, 19 Colo. 559, 36 Pac. 541. And see *Burgess v. Isherwood*, 101 Mich. 819, 59 N. W. 602. So, cancellation of certificate of membership in a board of trade amounts to the act of conversion. *Olds v. Chicago Board of Trade*, 33 Ill. App. 445.

²⁴⁶ Com. Dig. "Action; Trover," E.

²⁴⁷ *Richardson v. Atkinson*, 1 Strange, 576; *Philpott v. Kelley*, 3 Adol. & E. 106.

²⁴⁸ *Simmons v. Lillystone*, 8 Exch. 431. Cf. *Sanderson v. Haverstick*, 8 Pa. St. 294; *O'Reilly v. Shadle*, 33 Pa. St. 489. Castrating a "scrub hog" is not conversion. *Byrne v. Stout*, 15 Ill. 180.

²⁴⁹ *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243; *Wheelock v. Wheelwright*, 5 Mass. 104. And see *Petre v. Heneage*, 12 Mod. 519.

²⁵⁰ *Heald v. Carey*, 21 Law J. C. P. 97; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492.

²⁵¹ *Lee v. McKay*, 3 Ired. 29; *Powell v. Sattler*, Ames, Lead. Cas. 419.

stigates is as much a principal as he who performs the act of conversion.²⁵² An infant²⁵³ or a lunatic²⁵⁴ may be held liable in trover. The liability may arise from a joint wrong, as for wrongfully procuring a levy on which a sale was made.²⁵⁵ A defense set up by one joint tortfeasor avails to all.²⁵⁶ So conversion by one partner, of property which came into possession of the firm on partnership account, is conversion by the firm.²⁵⁷ The liability may arise from actual or implied consent subsequent to the wrong. Thus, the acceptance by a creditor of the proceeds of a wrongful sale of mortgaged property makes him liable in trover to the mortgagee.²⁵⁸ Wrongdoing by plaintiff may disentitle him.²⁵⁹

Joint Owners.

There are, however, circumstances which raise questions as to parties somewhat peculiar to conversion and trespass. "Short of destruction or something equivalent," one tenant in common may exercise full rights of property over a chattel, in defiance of the wishes of the other co-owners.²⁶⁰ But any conduct on the part of a co-tenant which amounts to an exclusion of the others from ownership renders him liable in conversion. A sale of the whole interest to a stranger is conversion:²⁶¹ or the seizure of the whole common crop in denial of the rights of other co-tenants.²⁶² Where

²⁵² *Bigelow Co. v. Heintze*, 53 N. J. Law, 60, 21 Atl. 100.

²⁵³ *Freeman v. Boland*, 14 R. I. 39, Chase, Lead. Cas. 200.

²⁵⁴ *Morse v. Crawford*, 17 Vt. 499. And see *Keyworth v. Hill*, 3 Barn. & Ald. 685.

²⁵⁵ *Phelps v. Delmore*, 69 Hun, 18, 23 N. Y. Supp. 220; *Marks v. Wright*, 81 Wis. 572, 51 N. W. 882. As to conspiracy in conversion, see *Lockwood v. Bartlett*, 130 N. Y. 340, 29 N. E. 257.

²⁵⁶ *Story & I. Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671.

²⁵⁷ *Nisbet v. Patton*, 4 Rawle, 119; *Hawkins v. Appleby*, 2 Sandf. 421. Cf. *Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178.

²⁵⁸ *Cone v. Iverson* (Wyo.) 33 Pac. 31, and 35 Pac. 933.

²⁵⁹ *Miller v. Lamery*, 62 Vt. 116, 20 Atl. 199.

²⁶⁰ *Campau v. Campau*, 45 Mich. 367, 8 N. W. 85; *Ball v. Palmer*, 81 Ill. 370; *Culver v. Rhodes*, 87 N. Y. 348; *Carr v. Dodge*, 40 N. H. 403. A sale in market overt is equivalent to a destruction. *Park, B.*, in *Farrar v. Beswick*, 1 Mees. & W. 688.

²⁶¹ *Lobdell v. Stowell*, 51 N. Y. 70; *Weld v. Oliver*, 21 Pick. 559.

²⁶² *Reed v. McRill*, 41 Neb. 206, 59 N. W. 775; *Marlowe v. Rogers*, 102 Ala. 510, 14 South. 790. And see *Wood v. Noack*, 84 Wis. 398, 54 N. W. 785.

one tenant in common unlawfully cuts and removes timber, although to save it from destruction by fire, he is guilty of conversion.²⁶³

Ministerial Duties.

Where there has been merely ministerial dealing with goods, the liability of the agent or servant in conversion has been a matter of much dispute. Three propositions on the point have, however, been very clearly enunciated:²⁶⁴ (1) A defendant is always liable if he has taken goods as his own and used them as his own. The rule is that persons who deal with property or chattels, or exercise dominion over them, do so at their peril.²⁶⁵ Therefore, one who has innocently taken goods in pledge from a person wrongfully dealing with them is liable in trover at the suit of the real owner.²⁶⁶ (2) When a person, though only an agent or a servant, takes part in a transaction which purports to effect a transfer of property in a chattel, and it turns out that his principal had no title, his ignorance of this fact does not protect him, for he has clearly intended and brought about that which is inconsistent with the rights of the true owner.²⁶⁷ Even an auctioneer or broker who sells property and pays the proceeds to his principal, who has no title, is liable in trover to the real owner, although he may have no knowledge of the defective title or the principal's want of authority.²⁶⁸ (3) If an agent intermeddles with the custody of chattels, in ignorance of his principal's lack of title, and also in ignorance that any alteration of the property is intended, he is not guilty of a conversion. "The true proposition as to possession and detention and asportation seems to me to be that a possession or detention which is a mere

²⁶³ *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795.

²⁶⁴ *Clerk & L. Torts*, 180. "A merely ministerial dealing with goods at the request of an apparent owner having the actual control of them appears not to be conversion." *Pol. Torts*, p. 293.

²⁶⁵ *Hollins v. Fowler*, L. R. 7 H. L. 757. *Merchants' & P. Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406.

²⁶⁶ *McComble v. Davies*, 6 East, 538; *Burroughes v. Bayne*, 5 Hurl. & N. 206.

²⁶⁷ *Hoffman v. Carow*, 22 Wend. 285; *Coles v. Clark*, 3 Cush. 399. But see *Spooner v. Holmes*, 102 Mass. 503.

²⁶⁸ *Everett v. Coffin*, 6 Wend. 603. Et vide *Milliken v. Hathaway*, 148 Mass. 69, 19 N. E. 16; *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419; *Williams v. Merle*, 11 Wend. 80; *Perkins v. Smith*, 1 Wils. 328.

custody or a mere asportation, made without reference to the question of the property in goods or chattel, is not a conversion."²⁶⁹

If a bailee, asserting no title in himself, restores the property to the bailor in accordance with the expressed or implied terms of the bailment, before notice or knowledge that the title is in a third person, he is not liable for conversion.²⁷⁰ On this principle, one who allowed wheat to be stored in his barn and shipped out by the storer, without knowledge of a replevin suit, which the plaintiff won, is not liable in trover.²⁷¹

SAME—REMEDIES.

211. The wrong involved in conversion may give the plaintiff

- (a) **An option to waive the tort and sue in assumpsit, or to resort to equity.**
- (b) **A right to sue in detinue.**
- (c) **A right to sue in replevin.²⁷²**
- (d) **A right to sue in trover for damages.**

Compensatory Damages.

The extent of plaintiff's recovery of damages is determined by the nature of his interest. The right of the absolute owner to recover has already been considered. If the plaintiff has but limited title, he can recover only according to his interest.²⁷³ The ordinary measure of compensatory damages in an action for conversion

²⁶⁹ Per Brett, J., in *Fowler v. Hollins*, L. R. 7 Q. B. 616-630; *Spackman v. Foster*, 11 Q. B. Div. 69; *Greenway v. Fisher*, 1 Car. & P. 190; *Burditt v. Hunt*, 25 Me. 419.

²⁷⁰ *Koch v. Branch*, 44 Mo. 542; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Loring v. Mulcahy*, 3 Allen, 575.

²⁷¹ *Valentine v. Duff* (Ind. App.) 33 N. E. 529. And see *Parker v. Lombard*, 100 Mass. 405; *Spooner v. Holmes*, 102 Mass. 503; *Frome v. Dennis*, 45 N. J. Law, 515; *Leonard v. Tidd*, 3 Metc. (Mass.) 6; *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389.

²⁷² The first three of these remedies have been already sufficiently discussed. Ante, p. 198.

²⁷³ *Fowler v. Gilman*, 13 Metc. (Mass.) 267; *Tenney v. Bank*, 20 Wis. 152; *Hale*, Dam. p. 118.

by a plaintiff who has been deprived of his chattel is the value of the property at the time of conversion, together with interest, and any special damages which may be incurred in consequence of the wrong.²⁷⁴ The value is ordinarily to be taken as of the time of the wrongful act.²⁷⁵ It has been held that a person cannot take any advantage of increased value given to the chattel by its improvement subsequent to the date of conversion.²⁷⁶ Thus, the normal measure of damages for conversion of timber has been held its value when first separated from the freehold, and not the value of the article into which it may have been converted.²⁷⁷ On the other hand, it has been urged that "the right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages."²⁷⁸

Much of the confusion and uncertainty as to the measure of damages in conversion, especially where intentional wrong is involved, has been removed by Mr. Justice Miller in the celebrated case of *Wooden-Ware Co. v. U. S.*²⁷⁹ The rule he there laid down for assessing damages against defendant is: (1) Where he is a willful trespasser, the full value of the property at the time and place of demand or of suit, but with no deduction for his labor and expenses; (2) where he is an unintentional or mistaken trespasser or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value; (3) where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.

²⁷⁴ *Shepard v. Pratt*, 16 Kan. 209. Plaintiff cannot be compelled to accept a return of the property, but if he does so voluntarily it will reduce the damages. *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 47. As to conversion of note, plaintiff is entitled to actual, and not face, value. *Griggs v. Day*, 137 N. Y. 542, 32 N. E. 1001.

²⁷⁵ Hale, Dam. p. 185, note 37.

²⁷⁶ *Reid v. Fairbanks*, 13 C. B. 692.

²⁷⁷ *Wetherbee v. Green*, 22 Mich. 311.

²⁷⁸ *Sillsbury v. McCoon*, 3 N. Y. 379.

²⁷⁹ This case has been generally followed and approved. *U. S. v. Baxter*, 46 Fed. 350-353; 106 U. S. 432, 1 Sup. Ct. 398; *U. S. v. Wingate*, 44 Fed. 129.

Special Damages.

Where the circumstances are such that a defendant must be aware that the chattel converted by him is required for some particular purpose, he may be liable to pay special damages for causing the failure of that purpose.²⁸⁰ Thus, in *Bodley v. Reynolds*²⁸¹ it was held that a carpenter who lost his employment because of the conversion of his tools might recover for loss of both the employment and the tools. There is, however, a distinction between special damages and special value. To entitle one to recover special damages not forming part of the actual present value of the goods, the defendant must have some notice of the inconvenience likely to be occasioned.²⁸² Mere capacity for profitable use is a part of the value of the chattel.

Exemplary Damages.

As to exemplary damages in trover, where the injury has been inflicted wantonly and maliciously, the jury is at liberty to give damages beyond the compensation for the loss or injury, and exemplary or vindictive in proportion to the degree of malice or wantonness evinced by the act of the defendant.²⁸³

²⁸⁰ *Parsons v. Sutton*, 66 N. Y. 92. ²⁸¹ 8 Q. B. 779.

²⁸² *France v. Gaudet*, L. R. 6 Q. B. 199.

²⁸³ *Neller v. Kelley*, 69 Pa. St. 403; *Mowry v. Wood*, 12 Wis. 413; *Allaback v. Utt*, 51 N. Y. 651. Et vide *Day v. Woodworth*, 13 How. 363.

CHAPTER XI.

NUISANCE.

- 212. Definition.
- 213. Rights Invaded.
- 214. The Annoyance or Interference.
- 215. Care and Motive.
- 216. Coming to Nuisance.
- 217. Locality of Nuisance.
- 218. Damages as the Gist.
- 219. Kinds of Nuisances.
- 220. Public, Private, and Mixed Nuisances.
- 221. Continuing Nuisance.
- 222. Legalized Nuisance.
- 223-224. Parties to Proceedings against.
- 225. Remedies.

DEFINITION.

212. Nuisance is a distinct civil wrong, consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights.¹

The subject of nuisance is one of the oldest heads of the English law. The early actions of assize of nuisance and of quod permittat prosternere were real actions, and were based upon the freehold title in the plaintiff and the defendant, respectively.²

Distinguished from Trespass.

Nuisance is distinguished from trespass. "The distinction between nuisance and trespass is that nuisance is only a consequence or result of what is not directly or immediately injurious, but its effect is injurious, while trespass is an immediate invasion of property."³ Moreover, nuisance usually consists in the use of one's own

¹ Cooley, Torts, § 565.

² 3 Bl. Comm. §§ 221, 222; Waggoner v. Jermaine, 3 Denio, 306.

³ Ang. Water Courses, § 388; Pol. Torts, 330.

property to the injury of a neighbor,⁵ whereas a trespasser ordinarily does wrong by his person, and not in the use of property. Certain wrongs, however, may be considered trespasses or nuisances, at the plaintiff's option.⁶ Thus, to keep a vicious animal, after notice, is to maintain a nuisance; but, when it attacks an individual, he may sue in trespass.⁷ Again, an overhanging wall, roof or tree is an actionable nuisance.⁸ Yet, said Mr. Blackstone, it is also "a species of trespass; for *cujus est solum, ejus est usque ad cœlum*."⁹ There are many wrongs to easements, or to property in the nature of an easement, which partake both of the nature of a trespass and a nuisance, and involve as well questions of negligence.

Distinguished from Negligence.

Nuisance and trespass, however, are alike in having ordinarily no reference to want of care, notice, or other mental condition.¹⁰ A nuisance is, in its commonest form, an annoyance to the person or property, as by bad smells, unpleasant noises, offensive sights, disagreeable vapors. Negligence and breach of duty to insure safety have no reference to such matters. But, for example, a thing dangerous may be regarded from the point of view of nuisance, negligence, or breach of duty to insure safety.¹¹

⁵ 1 Hll. Torts, 326, 327; *Norcross v. Thoms*, 51 Me. 503.

⁶ Post, p. 435.

⁷ Cooley, Torts, § 565.

⁸ *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 302-311; *Miles v. City of Worcester*, 154 Mass. 511, 28 N. E. 676.

⁹ 3 Bl. Comm. § 217; Pol. Torts, § 329; *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. 876.

¹⁰ *Upjohn v. Board*, 46 Mich. 542, 9 N. W. 845; *Cairncross v. Village of Pewaukee*, 86 Wis. 181, 56 N. W. 648; *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. 1024.

¹¹ *Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co.*, 42 Fed. 273-281; *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911; *Lafin & Rand Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389. Keeping gunpowder dangerously near the premises of another is a nuisance, and liability attaches for its explosion, irrespective of negligence. *Heeg v. Licht*, 80 N. Y. 579.

RIGHTS INVADED.

213. The legal rights with which a nuisance interferes may concern—

(a) Property,

(1) Corporeal, or

(2) Incorporeal; or

(b) Personal enjoyment of health and comfort.

Injury to Corporeal Property.

There is a distinction, it was held in the leading case of *St. Helen's Smelting Co. v. Tipping*,¹² between an action for a nuisance in respect to an action producing a material injury to the property, and one in respect to an action producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place and trades carried on around him. As to the former, the same rule would not apply.¹³ The nuisance may be to corporeal hereditaments. Thus, if one erects a smelting house so near the house of another that the vapor and smoke kill his corn and grass, and damage his cattle or injure his trees, this is a nuisance.¹⁴ Overhanging eaves, from which water flows on another's premises, constitute a nuisance.¹⁵ Corrupting the air with offensive smells,¹⁶ or disturbing the adjoining property with distressing noises on adjoining premises, may constitute a nuisance.¹⁷ By way of contrast, an occupant of land is under no duty to his neighbor to cut thistles naturally growing on his own land, to prevent them from seeding; and if,

¹² 11 H. L. Cas. 642 (1865).

¹³ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

¹⁴ *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735; *St. Helen's Smelting Works v. Tipping*, *supra*; *Campbell v. Seaman*, 63 N. Y. 568; *Pennoyer v. Allen*, 56 Wis. 502, 14 N. W. 600; *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246.

¹⁵ *Fitzh. Nat. Brev.* 184; *Gould v. McKenna*, 86 Pa. St. 297.

¹⁶ 3 Bl. Comm. 217; *Smiths v. McConathy*, 11 Mo. 517.

¹⁷ *Fish v. Dodge*, 4 Denio, 311; *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. St. 401; *Brill v. Flagler*, 23 Wend. 354.

because he neglects to cut them, seeds are blown on his neighbor's land, to the latter's damage, there is no liability.¹⁸

Incorporeal Property—Injury to Easement of Light and Air.

A nuisance may affect incorporeal hereditaments. There is no right, *ex jure naturæ*, to the free passage of light and air to a house or building. Light and air are not subjects of property, beyond the moment of actual occupancy.¹⁹ At common law, when windows had subsisted at a particular place for a long time, they were said to be ancient; and, if the adjoining landowner constructed a building so as to interfere with such ancient lights, his wrong fell short of a trespass, for there was no violation of another's possession or lands. The injury was recognized as a nuisance.²⁰ But the rule was otherwise as to air. In America, however, the doctrine of easement of light and air over the land of another has not been generally accepted as arising by prescription,²¹ although the easement may be created by grant.²² Accordingly, interference with another's light and air does not ordinarily constitute a nuisance. "Depriving one of a mere pleasure, as of a fine prospect, by building a wall or the like, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is, therefore, not an actionable nuisance."²³

Same—Support.

At common law, depriving a neighbor of the subjacent or adjacent support necessary to sustain his land in its natural and uncumbered state, by use of one's own land to the neighbor's damage, was an actionable wrong.²⁴ The right of lateral support existed only in favor of land unweighted by buildings; and no action lay without proof of appreciable damages.²⁵ Liability under such cir-

¹⁸ *Giles v. Walker*, 24 Q. B. Div. 656.

¹⁹ *Guest v. Reynolds*, 68 Ill. 478.

²⁰ *Aldred's Case*, 9 Coke, 58.

²¹ *Mahan v. Brown*, 13 Wend. 261; *Parker v. Foote*, 10 Wend. 309; *Haverstick v. Slpe*, 33 Pa. St. 368; *Jenks v. Williams*, 115 Mass. 217; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805.

²² *Keats v. Hugo*, 115 Mass. 204; *Compton v. Richards*, 1 Price, 27.

²³ *Aldred's Case*, 9 Coke, 58; *Hay v. Weber*, 79 Wis. 587, 48 N. W. 859.

²⁴ *Humphries v. Brogden*, 12 Q. B. 739; *Bonomi v. Backhouse*, 28 Law J. Q. B. 378.

²⁵ *Smith v. Thackerah*, L. R. 1 C. P. 564; *Thurston v. Hancock*, 12 Mass. 220.

cumstances depends on the negligence of the defendant in removing adjacent soil. If the weight of buildings prevented his making the excavation, carefully, without damage, there is no liability. There is, it is insisted, no such thing as an absolute right to support, but there is a qualified right entitling every man to have his soil left intact, that no removal of the adjoining soil can be made so as to disturb the integrity of the soil of others.²⁶ It is, however, absolute in the sense that negligence in the removal of the support need not be shown.²⁷

On the other hand, buildings are not deprived of this qualified right to support unless they sensibly increase the pressure on the lands. Where the structures do not contribute to the injury, there is no reason why they should affect the plaintiff's right to recover.²⁸ The right to support of land weighted by buildings may be acquired by grant and modeled by statute.²⁹ But the better opinion is that it cannot be acquired by prescription.³⁰

As to subjacent support, the rule is, where one possesses the surface and another the subsoil, the former has a right to such support from the lower strata as will suffice to maintain the surface in its natural state, i. e. unburdened by buildings; and the owner of the surface may not dig into the subsoil beyond what is necessary for the cultivation of the land or its proper enjoyments.³¹ The natural rights of the parties may, however, be varied by contract or by custom.

Same—Interference with Water Rights.

Every proprietor has a right to the continued flow of a natural stream running through his land, and to the use of its water to a reasonable extent. He may not accumulate it so as to overflow lands above him, nor seriously lessen the quantity of water which

²⁶ Wood, Nuis. § 172.

²⁷ Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. 84; Schultz v. Byers, 53 N. J. Law, 442, 22 Atl. 514.

²⁸ Victor Min. Co. v. Morning Star Min. Co., 50 Mo. App. 525.

²⁹ Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209; Jencks v. Kenny (Super. N. Y.) 19 N. Y. Supp. 243.

³⁰ Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209; Handlan v. McManus, 42 Mo. App. 551.

³¹ Humphries v. Brogden, 12 Q. B. 739; Stewart v. Chadwick, 8 Iowa, 463.

would naturally descend, or defile it so as to render it unfit for use.³² What is reasonable use of running water is a question for the jury. Thus, the erection and maintenance of a dam, flooding the land above, is a nuisance, rendering the wrongdoer liable in nuisance for damages to all persons whose lands are flooded.³³ As to what constitutes use to a reasonable extent, the authorities are not agreed. Ordinary use of water *ad lavandum et potandum* for domestic purposes and for cattle is a reasonable use, but the question is largely for the jury.³⁴ The use of water for any purpose not domestic, such as irrigation or manufacturing, sensibly diminishing the volume of the stream, is a nuisance.³⁵ The owner of the fee abutting on a running stream is entitled to take ice therefrom, if the taking does not interfere with navigation, or with the use of the water for hydraulic or other rightful purposes.³⁶ Diversion of water may be a wrong³⁷ and be the basis of an action for damages.³⁸ Diversion of water for purposes of irrigation and mining in Western states depends largely upon statutory regulations, especially as to prior appropriation. Substantial pollution of a stream by discharging foul matter into it may be a nuisance.³⁹ "Care must be taken to distin-

³² Ball, Torts, 43. The owner of land over which a natural stream of water flows has a right to the reasonable use of the water for mills, whatever the effect upon lower proprietors. *City of Springfield v. Harris*, 4 Allen, 494.

³³ *Butz v. Ihrle*, 1 Rawle, 218; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Stout v. McAdams*, 3 Ill. 67; *Brown v. Bowen*, 30 N. Y. 519. The wrong may also be regarded as a trespass. *McKee v. Delaware & H. Canal Co.*, 125 N. Y. 353, 26 N. E. 305; *Barden v. City of Portage*, 79 Wis. 126, 48 N. W. 210.

³⁴ *Wadsworth v. Tillotson*, 15 Conn. 369; *Wood*, Nuis. § 356.

³⁵ *Directors, etc., of Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal-Nav. Co.*, L. R. 7 H. L. 697. The maintenance of a storage dam for surplus water is a nuisance to lower proprietors. *Clinton v. Myers*, 46 N. Y. 511; *Embrey v. Owen*, 6 Exch. 353; *Clark v. Pennsylvania R. Co.*, 145 Pa. St. 438, 22 Atl. 989.

³⁶ *Edgerton v. Huff*, 26 Ind. 35.

³⁷ *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322; *Kimberly & Clark Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373.

³⁸ *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 308, 598; *New York Rubber Co. v. Rothery*, 57 Hun, 590, 10 N. Y. Supp. 872; *Williams v. Fulmer*, 151 Pa. St. 405, 25 Atl. 103.

³⁹ *Wood v. Waud*, 3 Exch. 748; *Merrifield v. Lombard*, 13 Allen, 16; *Bainard v. City of Newton*, 154 Mass. 255, 27 N. E. 995.

guish between the natural and necessary development of land itself, and injury resulting from the character of some business not incident and necessary to the development of the land or other substances lying within it. The owner of the land has the right to develop it by digging for coal, iron, gas, oil, or other minerals; and if, in progress of these developments, an injury occurs to the owner of adjoining lands, without fault or negligence on his part, an action for such injury cannot be maintained. If this were not so, a man might be utterly deprived of the use of his property." It is not so where the injury is caused by the prosecution of a business which has no necessary relation to the land itself, and is not necessary to its development. It was accordingly held that where a pipe-line company carried oil from a distance, and allowed it to escape and percolate through another's land, and destroy his springs, the company is liable in damages.⁴⁰ On the other hand, where mine water, with the impurities it had absorbed from the earth and minerals in the mines, flowed or was pumped from them, and allowed to take its natural course, the owner of the mines was not liable for damages produced, because the flow of such water was the natural and necessary result of the development by the owner of his own property.⁴¹

Same—Interference with Percolating, Subterranean, and Artificial Waters.

It is not material, so far as the wrong of befouling water is concerned, whether the damage is done to a defined water course, or water which has merely percolated.⁴² Therefore, the pollution of a well is a nuisance.⁴³ But any person may appropriate the whole of water percolating through or under his land.⁴⁴ There is difference

⁴⁰ *Hauck v. Tidewater Pipe-Line Co.*, 153 Pa. St. 366-375, 26 Atl. 644.

⁴¹ *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453; *Id.*, 102 Pa. St. 370, 86 Pa. St. 401, 94 Pa. St. 302. Cf. *Young v. Bankler Distillery Co.* [1893] App. Cas. 601.

⁴² *Womersley v. Church*, 17 Law T. (N. S.) 190; *Good v. Altoona City*, 162 Pa. St. 493, 29 Atl. 741.

⁴³ *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925.

⁴⁴ *New River Co. v. Johnson*, 2 El. & El. 435; *Wheatley v. Baugh*, 25 Pa. St. 528; *Ocean Grove v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433; *Frazier v. Brown*, 12 Ohio St. 294; *Swett v. Cutts*, 50 N. H. 439; *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796; *Acton v. Blundell*, 12 Mees. & W. 324.

of opinion as to whether such appropriation is actionable if it be malicious.⁴⁵ No right to such percolating water can be acquired by prescription, because of the indefiniteness of the right and the inability of the servient owner to prevent the user by which the right is claimed to be acquired.⁴⁶ But where the water is subterranean, but follows a defined course, it is subject to the law governing running streams or water courses, and not to the law of mere percolating waters.⁴⁷ It would seem that artificial water above ground has been generally regarded on the same basis with underground percolating water.

Same—Interference with Surface Water.

It may be safely said that no right of action accrues for injury arising from the natural flow or drainage of water from the premises of one upon or through the premises of another.⁴⁸ But beyond this the limitations placed by law on the right to gather and divert the flow of surface water, or to exclude it, are not clear.

By the common law, there is no right *jure naturæ* in the flow of surface water. Neither its detention, diversion, nor repulsion is actionable, though damages ensue.⁴⁹ This common-law rule is of a very recent origin.⁵⁰ There would seem, however, to be uncertainty as to what the common-law rule is. The ordinary rule is that the upper proprietor is not bound to permit water to flow onto the lower estate.⁵¹ The courts are by no means agreed as to how far the upper tenant may collect and concentrate surface waters, and pour them, as by means of an artificial ditch, upon the adjacent proprietor in an unusual quantity. Ordinarily, this right is denied,⁵² unless a

⁴⁵ *Wheatley v. Baugh*, 25 Pa. St. 528; *Chesley v. King*, 74 Me. 164; *Phelps v. Nowlen*, 72 N. Y. 39.

⁴⁶ *Wrightman, J.*, in *Chasemore v. Richards*, 7 H. L. Cas. 349-357, 2 Hurl. & N. 168.

⁴⁷ *Willis v. City of Perry (Iowa)* 60 N. W. 727; *Ottawa Gaslight & Coke Co. v. Graham*, 28 Ill. 73.

⁴⁸ *Livezey v. Schmidt*, 96 Ky. 441, 29 S. W. 25.

⁴⁹ *Bowlsby v. Speer*, 31 N. J. Law, 351; *Gannon v. Hargadon*, 10 Allen, 109; *Chatfield v. Wilson*, 28 Vt. 49; *Swett v. Cutts*, 50 N. H. 439.

⁵⁰ *Bowlsby v. Speer*, 31 N. J. Law, 351; *Barkley v. Wilcox*, 86 N. Y. 140; *Rawstron v. Taylor*, 11 Exch. 369.

⁵¹ *Frazier v. Brown*, 12 Ohio St. 294; *Livingston v. McDonald*, 21 Iowa, 160.

⁵² *Hurdman v. Northeastern Ry. Co.*, 3 C. P. Div. 168; *Smith v. Faxon*, 156

prescriptive right has been acquired.⁵³ It has, however, been recognized.⁵⁴ When the improvement of land for ordinary purposes without negligence accumulates surface waters, and causes them to flow upon the land of another, there is no liability.⁵⁵ On the other hand, the landowner may appropriate surface water flowing over his land in no definite channel, although it is thereby prevented from reaching a water course which it previously supplied.⁵⁶

The old common-law rule, that surface water is a common enemy, is materially modified by a recognition of the vague principle, "Sic utere tuo, ut alienum non lædas." The law allows the "reasonable use" of one's own land, and all this involves. More specifically, in this, as in other questions of nuisance, courts are governed by considerations of expediency. The comparative injury produced or relieved in many cases will determine.⁵⁷

Same—Nuisance on Highways.

Interference with the right of free and safe passage over a public highway has been regarded from the point of view of trespass,⁵⁸ and of negligence.⁵⁹ The obstruction or use of a street, so as to unreasonably impede travel, and render its use inconvenient or dangerous to travelers, may become a public nuisance.⁶⁰ The appropriation of a street by an individual, to be an actionable nuisance, need not be exclusive. It is sufficient if it renders the free passage less commodious.⁶¹ Thus, in *Barber v. Penley*,⁶² a person who, by carry-

Mass. 589, 31 N. E. 687; *Yerex v. Elneider*, 86 Mich. 24, 48 N. W. 875; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. 90; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 55.

⁵³ *Osten v. Jerome*, 93 Mich. 196, 53 N. W. 7; *Eshleman v. Martie Tp.*, 152 Pa. St. 68, 25 Atl. 178.

⁵⁴ *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53.

⁵⁵ *Brown v. Winona & S. W. Ry. Co.*, 53 Minn. 259, 55 N. W. 123; *Meixell v. Morgan*, 149 Pa. St. 415, 24 Atl. 216.

⁵⁶ *Broadbent v. Ramsbotham*, 11 Exch. 602; *Parks v. Newburyport*, 10 Gray, 28; *Goodale v. Tuttle*, 29 N. Y. 459.

⁵⁷ *Hughes v. Anderson*, 68 Ala. 280; *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462.

⁵⁸ *Ante*, p. 419.

⁵⁹ *Post*, p. 431, note 98.

⁶⁰ *Holmes v. Corthell*, 80 Me. 31, 12 Atl. 730.

⁶¹ *Hart v. City of Albany*, 9 Wend. 571; *State v. City of Mobile*, 5 Port. (Ala.) 279.

⁶² [1893] 2 Ch. 447.

ing on a theater, caused a crowd to assemble and obstruct the highway, thereby creating a nuisance to private adjoining owners, is answerable for the obstruction, if it be the necessary result of his acts, even though it be not his actual object. A nuisance may be actionable if it detract from the safety of travelers,⁶³ whether from something suspended in the air,⁶⁴ on the surface,⁶⁵ or from an excavation.⁶⁶ The safety of the traveler has reference to the ordinary means of locomotion. Therefore, things calculated to frighten horses may be actionable nuisances.⁶⁷ It would seem that no liability exists for injuries caused by a nuisance outside the limits of a highway.⁶⁸ But, to enable a private person to sustain the action, he must show special injury. The public may institute proceedings for the abatement or prevention of such a nuisance, irrespective of the question of pecuniary damage, by the speediest and most effectual remedy.⁶⁹

Interference with Health, Comfort, and Convenience.

It is not essential, however, to constitute a nuisance, that the injury should be to property.⁷⁰ The early conception of nuisance, as appears in Blackstone's definition and by the early forms of remedy provided by law, was an injury to lands, tenements, and heredita-

⁶³ Dygert v. Schenck, 23 Wend. 446.

⁶⁴ As an awning, McConnell v. Bostelmann, 72 Hun, 238, 25 N. Y. Supp. 300; a roof, Garland v. Towne, 55 N. H. 55 (cf. Mellen v. Morrill, 126 Mass. 545); a cornice, Grove v. Ft. Wayne, 45 Ind. 429; a bow-window, Jenks v. Williams, 115 Mass. 217.

⁶⁵ A cellar door, Daniels v. Potter, 4 Car. & P. 262; Proctor v. Harris, Id. 337; a gate, James v. Hayward, Cro. Car. 184; a fence, Neff v. Paddock, 26 Wis. 546; a building, Stetson v. Faxon, 19 Pick. 147.

⁶⁶ Cellar opening unguarded, Coupland v. Hardingham, 3 Camp. 398; coal hole, Clifford v. Dam, 44 N. Y. Super. Ct. 391. Et vide Barnes v. Ward, 9 C. B. 392.

⁶⁷ Foshay v. Town of Glen Haven, 25 Wis. 288; a derrick, Jones v. Housatonic R. Co., 107 Mass. 261; a tent, Ayer v. City of Norwich, 39 Conn. 376.

⁶⁸ Wood, Nuls. §§ 322-328; Irvine v. Wood, 51 N. Y. 224. Cf. Drake v. Lowell, 13 Metc. (Mass.) 292, with Congreve v. Smith, 18 N. Y. 79.

⁶⁹ Smith v. McDowell, 148 Ill. 51, 35 N. E. 141.

⁷⁰ This distinction has already been referred to in St. Helen's Smelting Co. v. Tipping, ante, p. 421, note 12. Mr. Bigelow says it is impossible to say just what this distinction is to be. The meaning appears to be that the degree of harm in an action for personal discomfort must be greater than in an action for injury to property. Sweeny v. Railroad Co., 10 Allen, 368.

ments. And, in some cases, only property owners can at the present time sue for nuisance.⁷¹ The scope of nuisance has, however, been widened so far as to clearly include such use of property or conduct of person as renders the enjoyment of life uncomfortable, or is indecent and offensive to the senses. Thus, noise⁷² may be so continuous and excessive, or vapors or noxious smells⁷³ render the enjoyment of life and property so uncomfortable, as to be a nuisance. A fortiori, the maintenance of anything injurious to health⁷⁴ may be a nuisance. It usually occurs that such interference with personal comfort or such personal offense is coincident with damage to property. It seems, however, that mental discomfort and injury which are not of temporal, but of spiritual, character, are not nuisances; as that resulting from running street cars on Sunday.⁷⁵

THE ANNOYANCE OR INTERFERENCE.

214. The annoyance or interference constituting a nuisance may arise from either or both—

- (a) The use, management, custody, or control of property; or
- (b) Personal conduct.

Use of Property.

Nuisance is ordinarily spoken of as a wrong arising where a person uses his own property so as to injure another's.⁷⁶ Many nuisances arise from the use of lands, as between adjoining owners with respect to water rights, structures on the land, and generally with respect to the use of the land. So, where premises become dan-

⁷¹ *Conrad v. Arrowhead Hot Springs Hotel Co.*, 103 Cal. 399, 37 Pac. 386; *Chace v. Warsaw Waterworks Co.*, 79 Hun, 151, 29 N. Y. Supp. 729; *Commissioners of Kensington v. Wood*, 10 Pa. St. 93.

⁷² *Brill v. Flagler*, 23 Wend. (N. Y.) 354; *Rex v. Smith*, 1 Strange, 704; *Campbell v. Seaman*, 63 N. Y. 568.

⁷³ *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246.

⁷⁴ A hospital in residential locality, *Gilford v. Babies' Hospital* (Sup.) 1 N. Y. Supp. 448. A cemetery, *Jung v. Neraz*, 71 Tex. 396, 9 S. W. 344.

⁷⁵ *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401; *First Baptist Church v. Schenectady & T. R. Co.*, 5 Barb. 79; *State v. Linkhaw*, 69 N. C. 214.

⁷⁶ *Norcross v. Thoms*, 51 Me. 503.

gerous, or are made dangerous, for example, by spring guns and traps, a nuisance may arise,⁷⁸ or where offensive agencies, like privies and cesspools, are allowed to exist to the annoyance of a neighborhood, or the pollution of waters;⁷⁹ or where a useful element is improperly turned aside.⁸⁰

A nuisance may arise from the ownership or control of personal property, as of dangerous animals;⁸¹ also from the custody or use of explosives,⁸² or of fire⁸³ or water.⁸⁴ In the conduct of business, and especially where vapors⁸⁵ or smoke⁸⁶ or stenches⁸⁷ or dust⁸⁸ or other similar annoyances arise, actions for nuisance are constantly sustained.⁸⁹ The old familiar principles of nuisance are changed, adapted, and extended to meet the emergencies of modern civilization. This is conspicuously true with respect to the commercial uses of electricity.⁹⁰ It seems to be settled, both in England and America, that electrical interference is a statutory nuisance, for which there is no remedy at common law.⁹¹

Personal Conduct.

A nuisance may be committed by personal conduct without involving property. Thus, indecent exposure in a public place, in the

⁷⁸ *Murray v. McShane*, 52 Md. 217; *State v. Moore*, 31 Conn. 479.

⁷⁹ *Haugh's Appeal*, 102 Pa. St. 42; *Wahle v. Reinbach*, 76 Ill. 322.

⁸⁰ *Parke v. Kilham*, 8 Cal. 77.

⁸¹ *Cox v. Burbridge*, 9 Jur. (N. S.) 970; *Nehr v. State*, 35 Neb. 638, 53 N. W. 589; *Baldwin v. Ensign*, 49 Conn. 113.

⁸² *Comminge v. Stevenson*, 76 Tex. 642, 13 S. W. 556.

⁸³ *Burroughs v. Housatonic Ry.*, 15 Conn. 124; *Galpin v. Railroad Co.*, 19 Wis. 604; *Vaughan v. Menlove*, 32 E. C. L. 208, 613.

⁸⁴ *Rylands v. Fletcher*, L. R. 3 H. L. 330.

⁸⁵ *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735; *Campbell v. Seaman*, 63 N. Y. 568.

⁸⁶ *Walter v. Selfe*, 4 Eng. Law & Eq. 15; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; *Smiths v. McConathy*, 11 Mo. 331.

⁸⁷ *Francis v. Schoellkopf*, 53 N. Y. 152; *Pennoyer v. Allen*, 56 Wis. 502, 14 N. W. 609; *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

⁸⁸ *Cooper v. Randall*, 53 Ill. 24.

⁸⁹ *Demarest v. Hardham*, 34 N. J. Eq. 469.

⁹⁰ As in *Chandler Electric Co. v. Fuller*, 21 Can. Sup. Ct. 337.

⁹¹ *Hudson River Tel. Co. v. Watervliet Turnpike & R. Co.*, 135 N. Y. 293, 32 N. E. 148.

presence of several persons.⁹² So, singing a ribald song,⁹³ swearing, using indecent language in a public place, or uttering loud cries in a public street, may constitute a nuisance.⁹⁴ Personal conduct often combines with use of property to constitute nuisance; as where public drinking saloons⁹⁵ are the scenes of noisy carousals by night and by day. So the indecent and boisterous behavior of inmates and visitors of a house of ill fame may also be the basis of recovery of damages and the issuance of an injunction on behalf of private individuals whose property is thereby injured.⁹⁶

SAME—CARE AND MOTIVE.

- 215. The interference with legal rights, which constitutes a nuisance, does not depend, ordinarily, upon either**
- (a) The care exercised by the wrongdoer, or**
 - (b) His motive.**

Care Immaterial.

Want of care is not an element of nuisance. It is therefore held that a person who placed a powder magazine in dangerous proximity to another's dwelling is liable for damages resulting from its explosion without his direct negligence.⁹⁷ In general, no exercise of care is a defense to the maintenance of a nuisance.⁹⁸ In legalized nuisance, however, the question of negligence may be material with respect to liability.⁹⁹

⁹² *Boom v. City of Utica*, 2 Barb. 104; *State v. Millard*, 18 Vt. 574.

⁹³ *State v. Toole*, 106 N. C. 736, 11 S. E. 168.

⁹⁴ *Com. v. Harris*, 101 Mass. 29; *State v. Powell*, 70 N. C. 67.

⁹⁵ *State v. Bertheol*, 6 Blackf. 474; *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241.

⁹⁶ *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514.

⁹⁷ *Chicago, W. & V. Coal Co. v. Glass*, 34 Ill. App. 364. Et vide *Lafin & Rand Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389; *Heeg v. Licht*, 80 N. Y. 579.

⁹⁸ *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 20 S. E. 280; *Hauck v. Pipe-Line Co.*, 153 Pa. St. 366, 26 Atl. 644; *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Dygert v. Schenck*, 23 Wend. 446, 447; *Congreve v. Smith*, 18 N. Y. 79; *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. 1024.

⁹⁹ See ante, p. 227; *Weld v. Gaslight Co.*, 1 Starkie, 189; *Lincoln v. City of Detroit*, 101 Mich. 245, 59 N. W. 617. And see *Hay v. Cohoes Co.*, 2 N. Y. 159.

Motive Immaterial.

It is ordinarily said that the intent or motive is immaterial to the determination of the question of whether a given case constitutes or does not constitute a nuisance.¹⁰⁰ This, however, is not safe as a universal proposition. Where a high fence serving no useful or needful purpose is built and maintained out of pure spite and malice, it has been held to be an actionable nuisance.* So, it is said that a noise may be a nuisance if mischievously or maliciously made, while a similar noise might not be, if made in carrying on a lawful calling.

SAME—COMING TO NUISANCE.

216. The plaintiff in a judicial proceeding against a nuisance is not ordinarily disentitled by having come to the nuisance, unless the right of the defendant amounts to an easement.

The early cases on nuisance held that one who came to a private nuisance by that act disentitled himself to complain of it.¹⁰¹ This amounted to saying that if the nuisance had been in existence for ever so short a time before the plaintiff came to it, that was enough to justify its continuance. However, this doctrine is exploded.¹⁰² "Carrying on an offensive trade for twenty years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travelers upon which it is a nuisance."¹⁰³ A right, however, to

¹⁰⁰ Aldred's Case, 9 Coke, 57a; Falloon v. Schilling, 29 Kan. 292; South Roy-alton Bank v. Suffolk Bank, 27 Vt. 505.

* Burke v. Smith, 69 Mich. 380, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381; Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Kessler v. Letts, 7 Ohio Cir. Ct. R. 108. See, also, ante, p. 32. Contra, Mahan v. Brown, 13 Wend. 261; Jenkins v. Fowler, 24 Pa. St. 308-310; Jenks v. Williams, 115 Mass. 217; Phelps v. Nowlen, 72 N. Y. 39.

¹⁰¹ Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900.

¹⁰² Fertilizing Co. v. Hyde Park, 97 U. S. 659; People v. Detroit White Lead Works, 82 Mich. 471-477, 46 N. W. 735; Boston Ferrule Co. v. Hills, 159 Mass. 147-151, 34 N. E. 85.

¹⁰³ Com. v. Upton, 6 Gray, 473.

commit a private nuisance may be acquired by prescription, as an easement,¹⁰⁴ or by estoppel.

SAME—LOCALITY OF NUISANCE.

217. In determining what annoyance amounts to a nuisance, the courts are governed by practical considerations as to the thing done, the place where, and the circumstances under which, it is done.

A business which is necessary and useful in large communities, and which is not a nuisance in itself, may become so in view of the circumstances in the neighborhood in which it is proposed. "Two things essential to general prosperity and happiness are useful trades whereby people are supplied with things necessary in life, and healthful and peaceful dwellings. And the structures for habitation and trade cannot well be remote from one another. Here, therefore, are two interests traveling to one ultimate goal, yet in constant conflict during the journey. And the courts, in administering justice between them, necessarily request each to lay aside something of what pertains to mere convenience and comfort, yet they permit each to stand so far on its own rights as not to be destroyed."¹⁰⁵ Public convenience, and even public necessity, do not justify the continuance of a nuisance, or constitute a reason why an injunction should not be issued.¹⁰⁶ The existence of similar nuisances in the same locality is not necessarily an excuse.¹⁰⁷ However, in determining how far locality enters into a nuisance, the courts are governed by practical considerations.¹⁰⁸ The useful-

¹⁰⁴ Post, p. 439, "Legalized Nuisance."

¹⁰⁵ Bish. Noncont. Law, § 418; Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401; Hole v. Barlow, 4 C. B. (N. S.) 334; Campbell v. Seaman, 63 N. Y. 568.

¹⁰⁶ Meigs v. Lister, 23 N. J. Eq. 199-205; Fertilizing Co. v. Hyde Park, 97 U. S. 659; McCaffrey's Appeal, 105 Pa. St. 253-255.

¹⁰⁷ Euler v. Sullivan, 75 Md. 616, 23 Atl. 845; Fay v. Whitman, 100 Mass. 76.

¹⁰⁸ Demarest v. Hardham, 34 N. J. Eq. 469; Collins v. Chartiers Val. Gas Co., 131 Pa. St. 143-152, 18 Atl. 1012; Bielman v. Railway Co., 50 Mo. App. 151-154.

ness,¹⁰⁹ the relative convenience,¹¹⁰ priority in establishment,¹¹¹ danger, temporary character, lawfulness of object, and similar considerations are given due weight.¹¹² It is constantly said to be the law, however, that beneficial character will not excuse or justify the continuance of a public nuisance,¹¹³ and that no place is convenient or proper for the maintenance thereof.¹¹⁴

SAME—DAMAGES AS THE GIST.

218. Annoyance, to constitute a nuisance, must cause substantial damage; for damages are the gist of the wrong, unless there is a physical invasion of, or interference with, another's property, in which case the presence or absence of actual damage is immaterial.

The creating or continuing of a nuisance in any form which involves the physical invasion of or interference with another's property is a wrong for which at least nominal damages may be recovered.¹¹⁵ Neither absence of actual¹¹⁶ damages, nor even benefit from the nuisance, nor abatement, will prevent such recovery.¹¹⁷ Thus, the overhanging of another's land is a nuisance for which an action

¹⁰⁹ *Tanner v. Trustees of Village of Albion*, 5 Hill, 121. *Circus, Inchbald v. Robinson*, 4 Ch. App. 388. *Bawdyhouse, Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514.

¹¹⁰ *Pilcher v. Hart*, 1 Humph. (Tenn.) 524; *Radcliff's Ex'rs v. Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661.

¹¹¹ *Whitney v. Bartholomew*, 21 Conn. 213; *Wiers' Appeal*, 74 Pa. St. 230; *Robinson v. Baugh*, 31 Mich. 290; *Rhodes v. Dunbar*, 57 Pa. St. 274.

¹¹² *Tuttle v. Church*, 53 Fed. 422; *Campbell v. Seaman*, 63 N. Y. 568.

¹¹³ *Wood*, Nuis. § 19; *People v. Detroit White Lead Works*, 82 Mich. 471-479, 46 N. W. 735.

¹¹⁴ *Bamford v. Turnley*, 3 Best & S. 62.

¹¹⁵ *Casebeer v. Mowry*, 55 Pa. St. 419; *Blodgett v. Stone*, 60 N. H. 167; *Copper v. Dolvin*, 68 Iowa, 757, 28 N. W. 59.

¹¹⁶ *Kimel v. Kimel*, 4 Jones (N. C.) 121; *Francis v. Schoellkopf*, 53 N. Y. 152; *Wesson v. Washburn Iron Co.*, 13 Allen, 95.

¹¹⁷ *Gleason v. Gary*, 4 Conn. 418; *Call v. Buttrick*, 4 Cush. 345.

will lie without allegation or proof of actual damages.¹¹⁸ So, to cause water to flow wrongfully upon another's land in such a way that its continuance would create an easement is sufficient to justify an injunction, irrespective of damages.¹¹⁹ Such nuisances are essentially trespasses. They are instances of forbidden conduct.¹²⁰

But when the act complained of is lawful in itself, a different rule prevails. Then it is only when some actual damage is done that a right of action ensues.¹²¹ Where the nuisance complained of is injurious to property, the damage must be substantial. "Everything must be looked at from a reasonable point of view. The law does not regard a trifling inconvenience, but only large sensible inconveniences and injuries, which sensibly diminish the comfort, enjoyment, or value of the property which they affect."¹²²

Substantial Interference with Comfort.

Where the wrong complained of is the interference with the ordinary physical comfort of human existence, it is not necessary that the offense should amount to an injury to health. The discomfort must, however, be physical, and not such as depends upon the taste or imagination.¹²³ In such cases the degree of harm must be greater than in an action for injury to property.¹²⁴ It was said in a leading English case that "there may be such a thing as legal nuisance from noise in a manufacturing or other populous town."¹²⁵ Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as excessive and unreasonable.¹²⁶

¹¹⁸ *Tucker v. Newman*, 11 Adol. & E. 40; *Codman v. Evans*, 7 Allen, 431.

¹¹⁹ *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, and 21 Pac. 11; *Cooper v. Randall*, 53 Ill. 24.

¹²⁰ See ante, p. 57.

¹²¹ 3 Suth. Dam. § 1085. See ante, p. 60.

¹²² *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Mahan v. Brown*, 13 Wend. 261; *Rhodes v. Dunbar*, 57 Pa. St. 274.

¹²³ *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201.

¹²⁴ See ante, p. 428.

¹²⁵ *Soltan v. De Held*, 2 Sim. (N. S.) 133. See, also, *Davls v. Sawyer*, 133 Mass. 289; *Leete v. Pilgrim Congregational Soc.*, 14 Mo. App. 590; *Rogers v. Elliott*, 146 Mass. 349, 15 N. E. 768.

¹²⁶ *Gaunt v. Fynney*, 8 Ch. App. 8-11; *Newson v. Pender*, 27 Ch. Div. 43.

KINDS OF NUISANCES.

219. Nuisances for which a private action will lie may be either—

- (a) Public, private, or mixed;
- (b) Continuing; or
- (c) Legalized.

SAME—PUBLIC, PRIVATE, AND MIXED NUISANCES.

220. To entitle a private person to maintain an action for a public nuisance, the injury complained of must be—

- (a) Peculiar to the plaintiff in kind, not merely in degree;
- (b) Substantial, not fanciful or evanescent;
- (c) The proximate result of the conduct complained of.¹²⁷

Kinds of Nuisances for Which a Private Action may Lie.

Public nuisances affect the public, and are annoyances to all the king's subjects. They are public wrongs. They result from the violation of public rights, and produce no special injury to one more than another of the people, and may be said to have a common effect and produce a common damage. The criterion by which to determine whether a particular case is to be classed as a public or a private nuisance seems to depend upon the consideration of whether it be indictable or not. Mr. Wood¹²⁸ distinguishes mixed nuisances, which are both public and private in their nature (public, in that they produce injury to many persons, or to all the public; and private, because at the same time they produce a special and particular injury to private rights), which subject the wrongdoer to indictment by the public and to damages at the suit of persons injured. Private nuisances, on the other hand, are injuries that result from the violation of private rights and produce damages to

¹²⁷ Brett, J., in *Benjamin v. Storr*, L. R. 9 C. P. 400–406. And see *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95–101.

¹²⁸ Wood, Nuis. § 16.

but one or a few persons, so that they cannot be said to be public.¹²⁹ With public nuisances pure and simple there is no further logical concern here.

Private Action for Public Nuisance.

Although for a public nuisance, so far as it affects the public generally, no private action lies, yet an individual who suffers a special injury or damage more than the rest of the community at large may have an action in respect to his special damage.¹³⁰ Such special damage is not sufficient if it be trifling. It must be substantial, as where it seriously affects the substance and value of property.¹³¹ It is not sufficient if remote.¹³² To support such an action the damage must differ in kind, as well as in degree, from that suffered in common. That the plaintiff suffers more inconvenience than others, from his proximity to the nuisance, is not enough.¹³³ A liquor nuisance is ordinarily exclusively a public one.¹³⁴ The right to maintain a private action for a liquor nuisance may, however, be conferred by statute;¹³⁵ and, in a criticised case,¹³⁶ a saloon has been held to be a nuisance per se.¹³⁷ The unreasonable and unnecessary obstruction of a navigable stream may be a public and at the same time a private nuisance, as to those individuals who suffer a particular damage therefrom distinct and apart from the people at large. The difference must be not merely

¹²⁹ *Burditt v. Swenson*, 17 Tex. 489; *Bagley v. People*, 43 Mich. 355, 5 N. W. 415.

¹³⁰ *Iveson v. Moore*, 1 Ld. Raym. 486; *Hart v. Board* (N. J. Sup.) 29 Atl. 490.

¹³¹ *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48; *Innis v. Railway Co.*, 76 Iowa, 165, 40 N. W. 701; *Hay v. Weber*, 79 Wis. 587, 48 N. W. 859.

¹³² *Zettel v. City of West Bend*, 79 Wis. 316, 48 N. W. 379; *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 13 Sup. Ct. 822; *Hay v. Weber*, 79 Wis. 587, 48 N. W. 859; *City of Allegheny v. Zimmerman*, 95 Pa. St. 287. But the damage need not be direct. It may be consequential. *Hughes v. Helser*, 1 Bin. 463; *Iveson v. Moore* (1699) Holt, 10.

¹³³ *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106. Cf. *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514.

¹³⁴ *State v. Stanley*, 84 Me. 555, 24 Atl. 983; *State v. Fleming*, 86 Iowa, 294, 53 N. W. 234; *Johnson v. People*, 44 Ill. App. 642.

¹³⁵ *Craig v. Plunkett*, 82 Iowa, 474, 48 N. W. 984.

¹³⁶ 7 Harv. Law Rev. 487.

¹³⁷ *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997.

in extent, but also in kind.¹³⁸ Accordingly, the discharge of garbage by a city, interfering with fishing, is an exclusively public wrong. An individual may not enjoin such discharge.¹³⁹ On the other hand, where one by dams and storage booms unnecessarily obstructs and delays another's log-driving operations, the latter is entitled to a private action, although the nuisance be also a public one. Streams navigable for floating logs are governed by the rules for highways.¹⁴⁰

A private action, in general, may be maintained to recover damages to property caused by operating in the vicinity works and machinery which fill the air with smoke and cinders and render it offensive and injurious to the health, and shake the premises so as to render occupation uncomfortable, though all persons owning estates in the vicinity have sustained similar injuries from the same cause.¹⁴¹

Private Nuisances.

The term "private nuisance" is used indiscriminately for a private nuisance, as defined, and for a mixed nuisance, as distinguished, by Mr. Wood. Indeed, the ordinary conception of a private nuisance would seem to be that it is any nuisance for which an action would lie on behalf of a private individual. There are, however, many cases which would seem to be private nuisances pure and simple,—as nuisance to private ways, to adjacent and subjacent support, water courses, surface waters, overhanging another's land, damages by an upper tenant of a building to a tenant of a lower story.¹⁴²

SAME—CONTINUING NUISANCE.

221. This subject has already been sufficiently considered.¹⁴³

¹³⁸ *Brayton v. City of Fall River*, 113 Mass. 218; *Blackwell v. Old Colony R. Co.*, 122 Mass. 1. Cf. *Winterbottom v. Lord Derby*, L. R. 2 Exch. 316.

¹³⁹ *Kuehn v. City of Milwaukee*, 83 Wis. 583, 53 N. W. 912.

¹⁴⁰ *Page v. Mille Lacs Lumber Co.*, 53 Minn. 492, 55 N. W. 608, 1119; *Rose v. Miles*, 4 Maule & S. 101; *Winterbottom v. Lord Derby*, L. R. 2 Exch. 316.

¹⁴¹ *Wesson v. Washburn Iron Co.*, 13 Allen. 95.

¹⁴² *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 34 N. E. 85.

¹⁴³ *Ante*, p. 223.

SAME—LEGALIZED NUISANCE.

222. Where the law has authorized the conduct complained of, which would otherwise be a nuisance, there can be no proper interference therewith, either by the act of the party or by judicial proceeding.

Legalized nuisance can scarcely be said to be a felicitous term. It is like calling a crime lawful. However, the term has passed into general use. What it means would seem to be this: To constitute a nuisance there must be a breach of legal right. Accordingly, if authority to do a given act is conferred, either by statute or by common law, which, but for such authority, would constitute a nuisance, the damage suffered in consequence is *damnum absque injuria*. Such damage is "incident to an authorized act." Within the limits of such authority, the parties defendant are, in the absence of negligence, completely protected from interference with the alleged nuisance, either by the act of the parties in the abatement of the nuisance, or by judicial proceedings, public or private, in law or in equity.¹⁴⁴

Nuisance Authorized by Statute.

A statute may authorize certain works, provided they be done without causing a nuisance, or it may authorize the nuisance itself, if necessary as a last resort.¹⁴⁵ On the one hand, a legislature, or a municipal corporation when sufficiently empowered, may declare places or property, used to the detriment of public interest or to the injury of health, morals, or the welfare of the community, a nuisance, although not such at common law. But neither may decree the destruction or forfeiture of property used so as to constitute a nuisance, and appoint officers to execute its mandate as a punishment of the wrong, or even to prevent the future illegal use of the property, it not being a nuisance per

¹⁴⁴ *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75.

¹⁴⁵ *Managers of the Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 193; *Ogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537; *Edmondson v. City of Moberly*, 98 Mo. 523, 11 S. W. 990; *Eastman v. Amoskeag Manuf'g Co.*, 44 N. H. 143.

se.¹⁴⁶ On the other hand, the legislature may determine by its laws that not to be a nuisance which would otherwise be a nuisance, upon the ground that the legislature is ordinarily the proper judge of what the public good requires.¹⁴⁷ Thus, it may authorize manufacturers to notify their workmen by ringing bells, or using whistles and gongs, in such a way that, but for legislative sanction, a nuisance would exist.¹⁴⁸ If a bridge, constructed in accordance with legislative authority, interferes with navigation, the injury to private persons is *damnum absque injuria*.¹⁴⁹ In the same way, the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operations of the railroad were not authorized by the legislature, must, if the running of the trains is so authorized, be borne by the individual without compensation or remedy in any form.¹⁵⁰

However, the legislative authority, to afford this immunity, must be express, or clearly and unquestionably implied, from powers expressly conferred, so as to make it appear that the legislature contemplated the doing of the very act which occasioned the injury. And even in such a case, the exemption does not extend to the claim of a private citizen for any damage, special inconvenience, or discomfort not experienced by the public at large.¹⁵¹ Therefore, for example, the owner of a lot abutting on the public street may recover damages against a railroad laid on such street, the operation of which darkened and polluted the air coming from that part of the street upon the lot.¹⁵² However, consequential annoyance, which may necessarily follow the running of the cars on the road

¹⁴⁶ *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878; *People v. Board of Health of City of Yonkers*, 140 N. Y. 1, 35 N. E. 320.

¹⁴⁷ *Bancroft v. City of Cambridge*, 126 Mass. 438-440.

¹⁴⁸ *Sawyer v. Davis*, 136 Mass. 239.

¹⁴⁹ *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. 206.

¹⁵⁰ *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661; *Belde-
man v. Atlantic City R. Co.* (N. J. Ch.) 19 Atl. 731.

¹⁵¹ *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246; *Hill v. City of New York*, 139 N. Y. 495, 34 N. E. 1090; *Bacon v. City of Boston*, 154 Mass. 100, 28 N. E. 9.

¹⁵² *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N. W. 629.

with reasonable care, is *damnum absque injuria*; but the exemption extends only to the limit of legislative authority. When the authority ceases, the exemption ceases.¹⁵³ The authority of a railroad company to bring its tracks within the limits of the city of Washington did not authorize it to construct shops and engine houses in the immediate vicinity of a church where services had been held during the week for a number of years before the erection of such shops.¹⁵⁴ The power of the legislature in America is controlled by constitutional provisions.¹⁵⁵ An important distinction exists between corporations clothed with powers of eminent domain and those which have no such right.¹⁵⁶ The former may construct and operate their authorized works, and are not liable if damages ensue, if there be no negligence or malice;¹⁵⁷ but they may not take private property without the payment of compensation, ascertained by a jury.¹⁵⁸ Accordingly, legislative grants do not exempt corporations from liability for imposing a burden which amounts to the actual taking of property for public purposes.

Nuisance Authorized by Common Law.

Prescription cannot legitimate a nuisance, properly speaking.¹⁵⁹ But, within the limits of actual user, and not of claim, prescription may give rise to an easement.¹⁶⁰ A public nuisance cannot be legalized by prescription, even so far as the right of a private individual specially injured is concerned. "In such cases, prescription has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air and comfortable enjoyment of

¹⁵³ *Evans v. Railway Co.*, 86 Wis. 597, 57 N. W. 354, collecting cases.

¹⁵⁴ *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719; *Id.*, 137 U. S. 568, 11 Sup. Ct. 185; *Smith v. London & S. W. Ry. Co.*, L. R. 6 C. P. 14.

¹⁵⁵ But an act authorizing an existing nuisance is a mere license, and may be revoked at pleasure, where no consideration is paid. *Councils of Reading v. Com.*, 11 Pa. St. 196.

¹⁵⁶ *Hauck v. Tidewater Pipe-Line Co.*, 153 Pa. St. 366, 26 Atl. 644.

¹⁵⁷ *Id.* Cf. *Booth v. Railroad Co.*, 140 N. Y. 267, 35 N. E. 592.

¹⁵⁸ *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473.

¹⁵⁹ *Dygert v. Schenck*, 23 Wend. 446; *Mills v. Hall*, 9 Wend. 315.

¹⁶⁰ *Horner v. Stillwell*, 35 N. J. Law, 307; *Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 886; *Drew v. Hicks* (Cal.) 35 Pac. 563.

property are as much rights belonging to it as the right of possession and occupancy.”¹⁶¹

PARTIES TO PROCEEDINGS AGAINST.

223. Subject to conventional variations in the normal right to sue, the parties plaintiff in a civil proceeding against a nuisance are in general determined by property interests.

224. Whoever creates or merely maintains a nuisance after notice to abate, is a proper defendant in such proceedings; but, as a joint tortfeasor, only when there is concert in action between the alleged wrongdoers.

Parties Plaintiff.

The parties plaintiff in a civil proceeding against a nuisance are determined primarily by property interests. For example, the reversioner may sue for permanent depreciation of property, or setting up an adverse claim of right; but ordinarily the tenant in possession is the proper party plaintiff.¹⁶² Several distinct owners or tenants may join in a suit to restrain a nuisance which is common to all and affects each in a similar way, but may not so join to restrain that which does a distinct and special injury to the property of each. Thus, annoyance from a lunatic asylum, though given acts do not occur at the same time, nor to the same person, but continually, is not a distinct, but a common, nuisance.¹⁶³ Where, however, the action is at law, owners of distinct interests, it has been insisted, must bring separate actions for the same nuisance.¹⁶⁴ A private action for a public nuisance can only be maintained by one who

¹⁶¹ Board of Health v. Lederer (N. J. Ch.) 29 Atl. 444; Chicago & E. R. Co. v. Loeb (Ill. Sup.) 59 Am. Rep. 341, note (8 N. E. 460); People v. Maher, 141 N. Y. 330, 36 N. E. 396.

¹⁶² Lockett v. Ft. Worth & R. G. Ry. Co., 78 Tex. 211, 14 S. W. 564; Belr v. Cooke, 37 Hun, 38; Jones v. Chappell, L. R. 20 Eq. 539.

¹⁶³ Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731.

¹⁶⁴ Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241; Hellams v. Switzer, 24 S. C. 39.

is the owner, or has some legal interest, as lessee¹⁶⁵ or otherwise, in the land which is affected by the nuisance. Therefore, one who lived in his wife's house could not sue for annoyance to himself or his family for corruption of the air by another.¹⁶⁶ Right of possession is sufficient interest.¹⁶⁷

Parties Defendant.

The person primarily liable for a nuisance is he who creates it, whether on his own land or not.¹⁶⁸ He cannot escape liability for its continuance by demising the premises whereon the nuisance is located;¹⁶⁹ nor, on the other hand, is he liable for his grantee's subsequent conduct whereby the nuisance is created.¹⁷⁰ The bare fact of ownership of real estate imposes no responsibility for a nuisance on it.¹⁷¹ Indeed, the occupier, and not the owner, is, in general, liable for nuisance thereon. A fair summary of the law on this point would seem to be that where the nuisance complained of is caused by the physical condition of the premises, resulting from acts of commission or omission while in the possession of the owner, he is liable, but where the nuisance arises, not from their physical condition, but from the mode of user, the occupier is liable.¹⁷² He who has created a nuisance on his own land being, accordingly, liable for it, his grantee is not liable, when he was not an actor in creating or actively maintaining it,¹⁷³ until it is shown

¹⁶⁵ *Cooper v. Randall*, 59 Ill. 317; *Kern v. Myll*, 94 Mich. 477, 54 N. W. 176; *Case v. Minot*, 158 Mass. 577, 33 N. E. 700.

¹⁶⁶ *Kavanagh v. Barber*, 131 N. Y. 211, 30 N. E. 235.

¹⁶⁷ *Hopkins v. Baltimore & P. R. Co.*, 6 Mackey, 311; *Crommelin v. Coxe*, 30 Ala. 318.

¹⁶⁸ The defense of independent contractor does not avail unless the wrong arise from the manner of doing the work, rather than from the work itself. *Ante*, p. 133; *Skelton v. Fenton Electric Light & Power Co.*, 100 Mich. 87, 58 N. W. 609; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072.

¹⁶⁹ *Ingwersen v. Rankin*, 47 N. J. Law, 18. An owner who rents a house, knowing it to be used for prostitution, is liable in damages to an adjoining owner. *Marsan v. French*, 61 Tex. 173.

¹⁷⁰ *Moore v. Langdon*, 2 Mackey, 127.

¹⁷¹ *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193.

¹⁷² *Clerk & L. Torts*, 321-327, collecting cases; *Fow v. Roberts*, 108 Pa. St. 489.

¹⁷³ *Whitenack v. Philadelphia & R. R. Co.*, 57 Fed. 901.

that he failed, upon request, to remove it ¹⁷⁴ within a reasonable time.¹⁷⁵

All persons who join, aid, or assist in creating and maintaining a nuisance may be jointly and severally liable.¹⁷⁶ But the liability of joint contributors is not necessarily that of joint tortfeasors. If the persons who maintain a nuisance act independently, and not in concert with others, each is liable for damages which result from his individual conduct only. And the fact that it may be difficult to actually measure the damage caused by the wrongful act of each contributor to the aggregate result does not affect the rule, or make any one liable for the acts of the others.¹⁷⁷ Each must be definitely connected as the proximate,¹⁷⁸ but not as the sole,¹⁷⁹ cause of the wrong.

REMEDIES.

225. Private remedies for a nuisance not merely statutory, may be

(a) Abatement

(1) By act of parties, or

(2) By judicial proceeding;

(b) Injunction, and other equitable remedies; or

(c) Action for damages.¹⁸⁰

¹⁷⁴ Philadelphia & R. R. Co. v. Smith, 12 C. C. A. 384, 64 Fed. 679; Eastman v. Amoskeag Manuf'g Co., 44 N. H. 143; Nichols v. City of Boston, 98 Mass. 39; Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573; Jones v. Williams, 11 Mees. & W. 176.

¹⁷⁵ Rychlicki v. City of St. Louis, 115 Mo. 662, 22 S. W. 908.

¹⁷⁶ Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911; Rogers v. Stewart, 5 Vt. 215.

¹⁷⁷ Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451; Chipman v. Palmer, 77 N. Y. 51; Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911.

¹⁷⁸ Russell v. Bancroft, 79 Tex. 377, 15 S. W. 282; Mirkil v. Morgan, 134 Pa. St. 144, 19 Atl. 628.

¹⁷⁹ City of Hannibal v. Richards, 35 Mo. App. 15.

¹⁸⁰ As to choice of remedies, see People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735; City of Grand Rapids v. Weiden, 97 Mich. 82, 56 N. W. 233.

Abatement by Act of Party.

The abatement of a nuisance by private persons is one of the oldest of recognized remedies for torts. It is, in general, the removal of the nuisance.¹⁸¹ Where a party can maintain an action for a nuisance, whether public or private, he may enter and abate it,¹⁸² provided he commit no breach of the peace,¹⁸³ unless the nuisance consists of unlawful and immoral conduct.¹⁸⁴

The right of abatement by the owner is clearly recognized, as to private nuisances. Thus, trees whose branches and roots extend over and into the land of another are nuisances, to the extent that the branches overhang and the roots penetrate the land of another; and the person whose land is injured may cut off the roots and branches only so far as they so penetrate and overhang his land, but he may not cut down the trees.¹⁸⁵ Also, when a public nuisance obstructs the individual right of a private person, he has been allowed to remove it, to enable him to enjoy that right, without being called to answer for so doing.¹⁸⁶ Indeed, it is said that a public nuisance may be abated by any person, whether he has been injured by it or not.¹⁸⁷ Notice or request to the occupant to abate is necessary if, when he acquired possession of the land, the nuisance already existed upon it, and he simply neglected to remove it.¹⁸⁸ Otherwise notice is not necessary. However, a very pressing exigency is required to justify summary action of this character; particularly, in the case of a public nuisance.¹⁸⁹ The person

¹⁸¹ 3 Bl. Comm. 5; Black. Law Dict. p. 5.

¹⁸² Baten's Case, 9 Coke, 53b; Amoskeag Manuf'g Co. v. Goodale, 46 N. H. 53, Burd. Lead. Cas. 475, collecting cases; Rhodes v. Whitehead, 27 Tex. 304.

¹⁸³ Stiles v. Laird, 5 Cal. 120; Mohr v. Gault, 10 Wis. 513.

¹⁸⁴ Gray v. Ayres, 7 Dana, 375.

¹⁸⁵ Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Hickey v. Railroad Co., 96 Mich. 498, 55 N. W. 989; Burling v. Read, 11 Q. B. Div. 904.

¹⁸⁶ Brown v. Perkins, 12 Gray, 89; Rex v. Rosewell, 2 Salk. 459, 3 Bl. Comm. 5; Crosland v. Pottsville Borough, 126 Pa. St. 511, 18 Atl. 15.

¹⁸⁷ Gates v. Blincoe, 2 Dana, 158; Wetmore v. Tracy, 14 Wend. 250.

¹⁸⁸ Jones v. Williams, 11 Mees. & W. 176; Grisby v. Clear Lake Waterworks Co., 40 Cal. 396; West v. Railway, 8 Bush, 408. See People v. Board of Health of City of Yonkers, 140 N. Y. 1, 35 N. E. 320.

¹⁸⁹ Wetmore v. Tracy, 14 Wend. 252; Hicks v. Dorn, 42 N. Y. 47.

abating is liable if in removing the nuisance he does more damage than is necessary, or converts the materials composing the nuisance.¹⁹⁰ Liability may attach for excessive abatement.¹⁹¹

Abatement by Action.

A nuisance may be abated by an action on principles similar to that which controls the issuance of an injunction,¹⁹² and by proceedings at law.¹⁹³ A nuisance may be abated in the same action in which damages are recovered.¹⁹⁴ A public nuisance may be abated by a suit of the people, by their proper officers.¹⁹⁵ In order that a nuisance may be abated by private action, special,¹⁹⁶ though not necessarily pecuniary, damages, must be shown.¹⁹⁷ Prescription is no defense against a private action to abate a public nuisance.¹⁹⁸

Equitable Remedies.

A court of equity may interfere, on behalf of one complaining of a nuisance, to prevent threatened¹⁹⁹ injury, to abate existing nuisances,²⁰⁰ or otherwise to effect justice. It exercises this inherent jurisdiction with great caution.²⁰¹ Equity will not, except for urgent and special reasons, enjoin an indictable public nuisance.²⁰²

¹⁹⁰ *Larson v. Furlong*, 50 Wis. 681, 8 N. W. 1; *Id.*, 63 Wis. 323, 23 N. W. 584.

¹⁹¹ *Harrower v. Rltson*, 37 Barb. 301; *Ely v. Supervisors*, 36 N. Y. 297; *Earp v. Lee*, 71 Ill. 193; *Barclay v. Com.*, 25 Pa. St. 503; *Gray v. Ayres*, 7 Dana, 375; *Morrison v. Marquardt*, 24 Iowa, 35.

¹⁹² *Nicholson v. Getchell*, 96 Cal. 394, 31 Pac. 265; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Earl v. De Hart*, 12 N. J. Eq. 280.

¹⁹³ *Barclay v. Com.*, 25 Pa. St. 503; *Tate v. Railroad Co.*, 10 Ind. 174. *Et vide* *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43.

¹⁹⁴ *Drinkwater v. Sauble*, 46 Kan. 170, 26 Pac. 433.

¹⁹⁵ *Township of Hutchinson v. Fillk*, 44 Minn. 536, 47 N. W. 255; *Barclay v. Com.*, 25 Pa. St. 503; *City of Orlando v. Pragg*, 31 Fla. 111, 12 South. 368.

¹⁹⁶ *Hogan v. Central Pac. R. Co.*, 71 Cal. 83, 11 Pac. 876.

¹⁹⁷ *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106.

¹⁹⁸ *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364, 47 N. W. 430.

¹⁹⁹ *Ex parte Martin*, 13 Ark. 198; *Wolcott v. Mellick*, 11 N. J. Eq. 204.

²⁰⁰ *Green v. Lake*, 54 Miss. 540.

²⁰¹ *Ex parte Martin*, 13 Ark. 198; *Wolcott v. Mellick*, 11 N. J. Eq. 204.

²⁰² *Inhabitants of Township of Raritan v. Port Reading R. Co.*, 49 N. J. Eq. 11, 23 Atl. 127. *Cf.* *Henry v. Trustees*, 48 Ohio St. 671, 30 N. E. 1122. The maintenance of a house of ill fame, though indictable, may be restrained. *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514.

Where there has been failure to exercise reasonable diligence,²⁰³ or acquiescence operating as estoppel, the plaintiff will be left to its remedy at law. Nor will a court of equity interfere where there is conflicting evidence. A chancellor will not attempt to usurp the functions of a jury, and pass upon disputed questions of fact.²⁰⁴ Accordingly, if the damages complained of are remote and speculative,²⁰⁵ if there be a dispute as to whether a nuisance exists,²⁰⁶ or if it is doubtful whether the apprehended nuisance may arise,²⁰⁷ or from what source damage complained of has arisen, no relief will be granted.²⁰⁸ Nor will equity interfere where damages are an adequate remedy. Mere injury to property, as by depreciation in value, entitles to damages only; but an offensive business, when it reaches the point of discomfort, and becomes injurious to health, calls forth the extraordinary power of a court of chancery to destroy it.²⁰⁹ But if the injured person has no adequate remedy at law, as where the injury would otherwise be irreparable to individuals, or great public injury ensue,²¹⁰ or where a multiplicity of suits is liable to be occasioned by its repetition or continuance, the court of chancery will assume jurisdiction.²¹¹ When the existence of a nuisance has been established at law, equity will issue an injunction, as a matter of course, when the nuisance is of a constantly occurring character, and especially if damages recovered are merely nominal, and therefore inadequate to prevent repetition.²¹²

²⁰³ *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 South. 192; *Goodall v. Crofton*, 33 Ohio St. 271; *St. James Church v. Arrington*, 36 Ala. 546.

²⁰⁴ But see *State v. Mayor & Aldermen of Mobile*, 5 Port. (Ala.) 279; *Dumesnil v. Dupont*, 18 B. Mon. 800.

²⁰⁵ *Hay v. Weber*, 79 Wis. 587, 48 N. W. 859.

²⁰⁶ *Wood v. McGrath*, 150 Pa. St. 451, 24 Atl. 682.

²⁰⁷ *Newark Aqueduct Board v. City of Passaic*, 45 N. J. Eq. 393, 18 Atl. 106, 46 N. J. Eq. 552, 20 Atl. 54, and 22 Atl. 55. Cf. *Clark v. Lawrence*, 6 Jones, Eq. 83.

²⁰⁸ *Rouse v. Martin*, 75 Ala. 510.

²⁰⁹ *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485.

²¹⁰ *State v. Mayor & Aldermen of Mobile*, 5 Port. (Ala.) 279.

²¹¹ *Board of Health v. New York Horse-Manure Co.*, 47 N. J. Eq. 1, 19 Atl. 1098; *Proprietors of Maine Wharf v. Proprietors of Customhouse Wharf*, 85 Me. 175, 27 Atl. 93. See *Webb v. Portland Manuf'g Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322.

²¹² *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746; *Wood*, Nuls. § 780.

Damages.

Damages may be awarded under circumstances which might not entitle one to an injunction restraining or abating the alleged nuisance. Difference in value between the property with and without the nuisance, by which a sale is defeated,²¹³ depreciation of property,²¹⁴ loss of rents or rental value,²¹⁵ loss of profits or crops,²¹⁶ are all proper elements for the consideration of a jury in determining compensatory damages. Damages where the nuisance is continuing have already been considered.²¹⁷ Special damages must be particularly alleged and proved.²¹⁸ A fortiori, in the case of public nuisance, the plaintiff in a private action must plead and prove special damages as to himself.²¹⁹ Exemplary damages are awarded on ordinary principles.²²⁰

²¹³ *Moore v. Langdon*, 6 Mackey, 6.

²¹⁴ *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S. W. 268; *Babb v. Curators of the University of Missouri*, 40 Mo. App. 173; *Wesson v. Washburn Iron Co.*, 13 Allen, 95.

²¹⁵ *Willey v. Hunter*, 57 Vt. 479; *Herbert v. Rainey*, 162 Pa. St. 525, 29 Atl. 725; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427; *Stetson v. Faxon*, 19 Pick. 147; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813.

²¹⁶ *Lawson v. Price*, 45 Md. 123; *French v. Connecticut River Lumber Co.*, 145 Mass. 261, 14 N. E. 113; *Folsom v. Apple River Log-Driving Co.*, 41 Wis. 602; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

²¹⁷ *Ante*, p. 223.

²¹⁸ *Solms v. Lias*, 16 Abb. Prac. 311.

²¹⁹ *Hart v. Evans*, 8 Pa. St. 13.

²²⁰ *Morford v. Woodworth*, 7 Ind. 83; *McFadden v. Rausch*, 119 Pa. St. 507, 13 Atl. 459; *Parrott v. Housatonic R. Co.*, 47 Conn. 575.

CHAPTER XII.**NEGLIGENCE.**

- 226-228. Definition—Essential Elements.**
- 229. Degrees of Negligence.
- 230. Duty to Exercise Care.
- 231. Common-Law Duty.
- 232-233. Contract Duty.
- 234. Statutory Duty.
- 235. Violation of Duty.
- 236-237. Burden of Proof.
- 238. Evidence.
- 239. Damages.
- 240. Contributory Negligence.
- 241-245. Elements of Contributory Negligence.
- 246. Comparative Negligence.
- 247-249. Vicarious Negligence.

DEFINITION—ESSENTIAL ELEMENTS.

226. "Negligence is the failure to observe, for the protection of the interests of another, that degree of care, precaution, and vigilance which the circumstances justly demand."¹

227. The essential elements of actionable negligence are:

- (a) Failure to exercise commensurate care, involving
- (b) A breach of duty, resulting proximately in
- (c) Damage to plaintiff.

228. The prevailing tendency is to regard negligence, not as a state of mind, nor as involving intention, but as requiring inadvertence as an essential element.

In the modern view of negligence, it is regarded as one of the three bases of liability in tort; that is to say, (a) in some cases, a man acts at his peril; (b) in others, bad motive determines his liability; and (c) finally, he may be liable because of negligence proper.²

¹ Cooley, Torts, p. 30, note L.

² See ante, p. 28.

In other words, the law imposes on every one the duty of exercising due care to avoid harming others. Duty and care are not two distinct ideas. There is an inevitable connection between them. The care which it is one's duty to exercise varies with circumstances. "While there may be some shades of difference in the various definitions of 'negligence,' all the authorities agree that its essential element consists in a breach of duty, and that, in order to sustain an action, the plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him."³ Although there is no dispute as to this most certain of the propositions in the law of negligence, there is no corresponding clearness or certainty in the definition of "duty." Common-law duty is derived from analysis of circumstances. It is determined by the reference of the law to the various conditions which determine what is commensurate care. Contract duty is, perhaps, no more than the application of common-law principles to a state of facts of which a contract is a necessary part. Statutory duty frequently re-enacts the requirements of the common law, and is enforced by common-law principles.

Mental Element—Inadvertence Essential to Negligence.

There is no doubt but that in very many cases a party's state of mind, or, more accurately, his knowledge, is an essential element in the determination of what is negligence. Under certain circumstances, knowledge of the facts from which a duty arises is conclusively presumed; in others, the party charging negligence must show that knowledge existed.⁴ Vigilance and attention are material elements, and must conform to the nature of the emergency.⁵

But it is strenuously denied that negligence is a state of the mind,⁶ and that it can ever, strictly speaking, be intentional.⁷ "Negligence

³ Shepherd, J., in *Emry v. Water-Power Co.*, 111 N. C. 94, 95, 16 S. E. 18, and authorities cited. Et vide *Arnold v. Railroad Co.*, 115 Pa. St. 135, 8 Atl. 213; *Newhard v. Railroad Co.*, 153 Pa. St. 413, 26 Atl. 105. Cf. *Clements v. Light Co.*, 44 La. Ann. 692, 11 South. 51; *Macomber v. Nichols*, 34 Mich. 212.

⁴ Thus, knowledge of the vicious propensity of a wild animal is presumed, but such knowledge of a domestic animal must be shown. Post, p. 459.

⁵ *Hutchinson v. Light Co.*, 122 Mass. 219.

⁶ Pol. Torts, 355, 356; Clerk & L. Torts, 355.

⁷ Evidence of defendant's intent is not admissible in an action for negligence. *Hankins v. Watkins*, 77 Hun, 360, 28 N. Y. Supp. 867. Generally, negligence is not designed. *Gove v. Insurance Co.*, 48 N. H. 41.

is the contrary of diligence, and no one describes diligence as a state of the mind.”⁸ It is urged with great force that negligence is distinguished from criminal wrong or willful tort by the element of inadvertence on the part of the person causing the injury.⁹ “When the injury is intentional, the case is infected with malice or dolus, and a suit for negligence cannot be maintained.”¹⁰ It would appear certain that the presence of good faith,¹¹ or the absence of intent,¹² does not prevent liability for negligence. In its ordinary acceptation, negligence does not include malice; and courts have refused to give it any other.¹³ Willful wrong differs from wrong arising from mere inadvertence in many practical substantial respects. The measure of damages for mere negligence is compensation; for willful wrong, exemplary damages are awarded.¹⁴ Contributory negligence is a complete answer in an action for negligence, but is not a bar to an action for willful tort.¹⁵ To insist that inadvertence is essential to negligence, and that as soon as conduct ceases to be careless, and becomes willful, the cause of action is no longer based on negligence, is in accord with the traditional distinction between trespass and case, and with a distinct tendency on the part of modern jurisprudence and the courts to separate from allied wrongs injuries which rest primarily on willful or malicious disregard of, or interference with, the rights of others.

Willful and Wanton Negligence.

It is vigorously insisted that willful negligence involves a contradiction in terms, and is a misleading and dangerous expression.¹⁷

⁸ Pol. Torts. 336.

⁹ Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¹⁰ Whart. Neg. § 11; 2 Thomp. Neg. 739, note 3; Bish. Noncont. Law, 501.

¹¹ Lincoln v. Buckmaster, 32 Vt. 652; Louisville & N. R. Co. v. McCoy, 81 Ky. 403.

¹² Sharp v. Bonner, 36 Ga. 418; Tally v. Ayres, 3 Sneed (Tenn.) 677; Danner v. Railroad Co., 4 Rich. Law, 329; Amick v. O'Hara, 6 Blackf. (Ind.) 258; Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; Bish. Noncont. Law, § 499.

¹³ Montgomery v. Booming Co., 88 Mich. 633-644, 50 N. W. 729. But see Richter v. Harper, 95 Mich. 221-226, 54 N. W. 768.

¹⁴ Fell v. Northern Pac. R. Co., 44 Fed. 248; Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489.

¹⁵ Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692; Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484; Louisville Safety-Vault & Trust Co. v. Louisville & N. R. Co., 92 Ky. 233, 17 S. W. 567.

¹⁷ 16 Am. & Eng. Enc. Law, 394.

The cases of negligence, as they arise in practice and are found in reports, are not determined by theoretical considerations. The same state of facts may give rise to a cause of action which may be based on either willfulness or negligence. Gross and reckless negligence, indeed, may in law amount to intentional mischief.¹⁸ A plaintiff would naturally claim moral wrong on the defendant's part whenever possible, both for the purpose of increasing the measure and extent of his damages, and to avoid the defense of contributory negligence. If, however, he should fail to prove willfulness, he may be able to recover for negligence. Hence, actions for "willful negligence" and "wanton negligence" are continually brought.¹⁹ And the plaintiff is not required to show the appropriateness of every adjective used in his complaint. Therefore, if he alleges that the defendant willfully, wantonly, negligently, and unlawfully did the wrong, he can recover on proof of negligence.²⁰ But the cases are not harmonious on this point.²¹

DEGREES OF NEGLIGENCE.

229. The general tendency is to recognize one degree of care,—commensurate care, or due care under the circumstances,—and to disregard the earlier divisions of negligence, as to degrees, into slight, ordinary, or gross.

¹⁸ *St. Louis, I. M. & S. Ry. Co. v. Ledbetter*, 45 Ark. 246; *Shumacher v. Railroad Co.*, 39 Fed. 174.

¹⁹ See *Kentucky Cent. R. Co. v. Gastineau's Adm'r*, 83 Ky. 119; *Georgia Pac. Ry. Co. v. Lee*, 92 Ala. 262, 9 South. 230; *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70; *East St. Louis Connecting Ry. Co. v. O'Hara*, 49 Ill. App. 282, 150 Ill. 580, and 37 N. E. 917. The term "willful neglect" applies only to actions for loss of life, involving punitive damages. *Chesapeake & O. Ry. Co. v. Yost* (Ky.) 29 S. W. 326.

²⁰ *Richter v. Harper*, 95 Mich. 221-226, 54 N. W. 768, overruling, as to this point, *Montgomery v. Booming Co.*, 88 Mich. 633, 50 N. W. 729. And see *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. Such allegation would support a recovery for willful injury. *Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551. But a mere allegation of negligence will not support a recovery for intentional wrong. *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill. 431. Under an allegation of simple negligence, evidence of willful or wanton negligence is admissible. *Louisville & N. R. Co. v. Hurt*, 101 Ala. 34, 13 South. 130.

²¹ See *Verner v. Railroad Co.*, 103 Ala. 574, 15 South. 872.

Lord Holt, in *Coggs v. Bernard*,²² distinguished, as to bailments, three grades or degrees of negligence: In bailments for the sole benefit of the bailor, the bailee will be liable only for gross negligence;²³ in bailments for the mutual benefit of both parties, he will be liable for ordinary negligence; in bailments for the sole benefit of the bailee, he will be liable even for slight negligence. This distinction has been extended into the law of negligence generally, though it has been frequently and justly criticised.²⁴ Negligence may be defined generally as the breach of a duty to exercise commensurate care, resulting in damage.²⁵ An omission of such duty resulting in damage ought to impose liability. There is no such thing as excusable negligence. It is said that gross negligence is "ordinary negligence with a vituperative adjective."²⁶ It would, perhaps, be more logical to apply the adjective of comparison to the term "diligence," rather than to the correlative term "negligence." Thus, where the exercise of great diligence is the duty imposed, a slight omission of diligence—i. e. slight negligence—is a failure to exercise commensurate care. Where only slight diligence is the measure of duty, slight omissions do not involve a failure to exercise commensurate care, and therefore there is no negligence. In such a case it is very misleading to say that there is slight negligence, but no liability. When only slight diligence is required, there must be a gross omission of diligence—an omission of almost all diligence—in order to involve a failure to exercise commensurate care, or, in other words, to constitute negligence; for commensurate care in such a case is slight care.²⁷ Nevertheless, the terms "slight

²² 2 *Ld. Raym.* 909.

²³ But see *Wilson v. Brett*, 11 *Mees. & W.* 115.

²⁴ Degrees of negligence are not recognized in some cases. *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 *N. Y.* 278; *Hall v. Railroad Co.*, 46 *Minn.* 439, 49 *N. W.* 239. See, also, as to degrees of negligence, *The New World v. King*, 16 *How.* 474; *Railroad Co. v. Lockwood*, 17 *Wall.* 382; *Wilson v. Brett*, 11 *Mees. & W.* 115.

²⁵ *Brown v. Railway Co.*, 49 *Mich.* 153, 13 *N. W.* 494; *Blyth v. Waterworks*, 11 *Exch.* 781; *City of Terre Haute v. Hudnut*, 112 *Ind.* 542, 13 *N. E.* 686.

²⁶ Rolfe, B., in *Wilson v. Brett*, 11 *Mees. & W.* 113-115.

²⁷ *Milwaukee & St. P. Ry. Co. v. Arms*, 91 *U. S.* 489-494; *The New World v. King*, 16 *How.* 469, 474; *McAdoo v. Railroad Co.*, 103 *N. C.* 140, 150, 11 *S. E.* 316.

negligence," "gross negligence," and "ordinary negligence" are convenient terms to indicate the degree of care required.²⁸ The question of negligence is determined in all cases by reference to what would have been the conduct of a reasonably prudent man under the circumstances. In cases where professional skill is required, the skill of the average member of the same profession or class is the standard of comparison. The jury stands in the place of a prudent man, and determines the standard of his conduct.

DUTY TO EXERCISE CARE.

230. The duty, violation of which gives rise to a cause of action in negligence, is to exercise due care under the circumstances. Mere carelessness, resulting in harm to another person, is not actionable, unless thereby there be violated a duty owed by the wrongdoer to the sufferer,²⁹ prescribed by

- (a) Common law;
- (b) Contract; or
- (c) Statute.

SAME—COMMON-LAW DUTY.

231. The common-law duty of exercising care to avoid harm has reference to

- (a) Course and constitution of nature, as appears especially in cases involving "the use of one's own," or cases also treated under insurance of safety;
- (b) Knowledge of parties to the wrong;
- (c) Capacity and class of the parties to the wrong;
- (d) Custom and license.

Course and Constitution of Nature.

The duty to exercise care has reference to the course and constitution of nature. Thus, the care to be taken of streets in regard to

²⁸ Hale, Bailm. p. 24. " 'Gross negligence' is a convenient phrase to express the idea that the degree of care required of defendant is small." Lord Chelmsford in *Giblin v. McMullen*, L. R. 2 P. C. 317-340.

²⁹ *Miller v. Woodhead*, 104 N. Y. 471, 11 N. E. 57.

accumulations of ice and snow is judged with reference to climatic conditions. What reasonable care might require in an old and settled community, and in a mild climate, might be too high a standard in a thinly-settled northern country.³⁰ While, on the one hand, the natural tendency to do harm of things of weight, things in motion, explosives, and the like, must be guarded against with a high degree of care, on the other hand the law does not require provision to be made against unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by a prudent and careful man.³¹ Persons must exercise care with reference to the known nature of animals.³² Thus, an engineer must exercise care in blowing a whistle or allowing steam to escape, so as to avoid needlessly frightening horses.³³ So, if a railroad company places salt on its track, it is liable for trespassing animals thus lured there and killed by a passing train.³⁴ The owner of things tempting to children must exercise care to prevent the indulgence in their natural propensities from doing harm.³⁵ But ordinarily one is justified in acting on the assumption that others will act as persons of ordinary sense and prudence usually do. Thus an engineer may presume that a person on the track will get off to avoid being struck.³⁶

³⁰ *Wright v. City of St. Cloud*, 54 Minn. 94, 55 N. W. 819.

³¹ *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. 943; *Piedmont & C. R. Co. v. McKenzie*, 75 Md. 458, 24 Atl. 157; *McPherson v. Railroad Co.*, 97 Mo. 253, 10 S. W. 846; *Brendlinger v. New Hanover Tp.*, 148 Pa. St. 93, 23 Atl. 1105. And see *Jackson v. Telegraph Co.*, 88 Wis. 243, 60 N. W. 430.

³² As to frightening horses. see *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Carraher v. Bridge Co.*, 100 Cal. 177, 34 Pac. 828; *Plollet v. Simmers*, 106 Pa. St. 95; *Gilbert v. Railroad Co.*, 51 Mich. 488, 16 N. W. 868.

³³ *Omaha & R. V. R. Co. v. Clarke*, 39 Neb. 65, 57 N. W. 545. See *Cahoon v. Railroad Co.*, 85 Wis. 570, 55 N. W. 900; *Fritts v. Railroad Co.*, 62 Conn. 503, 26 Atl. 347.

³⁴ *Burger v. Railroad Co.*, 52 Mo. App. 119.

³⁵ *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283; *Keffe v. Railroad Co.*, 21 Minn. 207.

³⁶ *Norwood v. Railroad Co.*, 111 N. C. 236, 16 S. E. 4; *Railroad Co. v. Hicks*, 89 Tenn. 301, 17 S. W. 1036.

Same—Dangerous Instrumentalities—Duty to Insure Safety.

The common-law duty to exercise care to avoid doing harm to others may be derived from the ownership, custody, control, or use of instrumentalities which may of necessity, or in reasonable probability, inflict damage. In determining liability for injuries caused by such instrumentalities, the courts have not thoroughly distinguished whether such liability is to be referred to principles governing: (a) nuisance; (b) duty to insure safety; (c) negligence; or (d) malicious wrongs.³⁷ More specifically (and leaving malicious wrongs out of view) accumulations of water, things of weight, fire, explosives, poisons, wild or vicious animals, have been regarded from the point of view of nuisance,³⁸ negligence, and absolute duty to keep safe; while things in motion and electricity are generally regarded from the point of view of either negligence or nuisance.

The English rule is³⁹ essentially as follows: Irresponsible instruments may be such as are not dangerous apart from the conduct of the keeper or user of them, and such as are dangerous in themselves. Everything is deemed dangerous to rights which either causes actual damage thereto, or which does so in the absence of a degree of care and prudence the continual exercise of which cannot be expected. As to things not dangerous in themselves, the owner or keeper is not held responsible for harm caused thereby, provided he does not know of the mischief or danger, or only knows of it as existing in certain circumstances, and the harm that occurs does not arise from these circumstances, and he has taken the care which a prudent man would take in keeping or using such thing according to the nature and properties of things of its class. But as to irresponsible instrumentalities dangerous in themselves, and such instrumentalities which, though not necessarily or ordinarily in this class, are, and are known actually or by imputation of law to the owner or keeper to be, dangerous to rights, the duty imposed on the owner or keeper is not to harm; and harm done, however careful he may have been to avoid it, is still imputed to him as an effect arising from his having risked the chance of harm occurring from the instrumentality employed by

³⁷ Ante, c. 9; liability for negligence contrasted with absolute liability, *Marshall v. Welwood*, 38 N. J. Law, 339.

³⁸ *Heeg v. Licht*, 80 N. Y. 579.

³⁹ *Innes*, Torts, pp. 73-92.

him. This doctrine is largely modified, and is subject to, at least, the following exceptions: (a) The act of God or vis major; (b) the wrongful interference of third persons; (c) the plaintiff's own fault; (d) artificial work maintained for the common benefit of the plaintiff and the defendant (as in *Carstairs v. Taylor*);⁴⁰ and (e) where, by virtue of a custom, the act is authorized, and there is *damnum absque injuria* (as in the *Zemindar Case*).

The American courts have only partially, and by no means uniformly, accepted these views. They incline to test liability, under such circumstances, by principles of negligence;⁴¹ to hold the owner and keeper of such instrumentalities to the exercise of a proportionately high degree of care; and to recognize the production of damage by such instrumentalities as *prima facie* evidence of wrongdoing.

Same—Illustrations of Rule as to Dangerous Instrumentalities.

In *Fletcher v. Rylands*,⁴² the defendants had collected water into a reservoir on their own land, which, without fault on their part, broke through into plaintiff's mine, and flooded it. Defendants were held liable on the ground that, in bringing a dangerous instrumentality onto their land, they acted at their peril, and were absolutely bound to see that it did no harm. This doctrine has been followed in a few cases in this country,⁴³ but the tendency is to modify it.⁴⁴ It has been generally rejected, and, by the great weight of authority, liability in this class of cases is dependent on negligence.⁴⁵ In a similar case in India,⁴⁶ defendant was held not liable, because the customary law of India authorized the maintenance of reservoirs, and the damage was therefore incident to an author-

⁴⁰ L. R. 6 Exch. 217.

⁴¹ *Losee v. Buchanan*, 51 N. Y. 476.

⁴² L. R. 1 Exch. 265. Cf. *Wilson v. City of New Bedford*, 108 Mass. 261.

⁴³ *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292); *St. Anthony Falls Water-Power Co. v. Eastman*, 20 Minn. 277 (Gil. 249); *Gray v. Harris*, 107 Mass. 492; *Chandler Electric Co. v. Fuller*, 21 Can. Sup. Ct. 337.

⁴⁴ *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292); *Hannem v. Pence*, 40 Minn. 131, 41 N. W. 657; *Berger v. Gaslight Co.*, 60 Minn. 296, 62 N. W. 336.

⁴⁵ *Livingston v. Adams*, 8 Cow. (N. Y.) 175; *Losee v. Buchanan*, 51 N. Y. 476; *Burroughs v. Railroad Co.*, 15 Conn. 124; *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. St. 126, 6 Atl. 453.

⁴⁶ *Madras R. Co. v. Zemindar of Carvatenagarun*, L. R. 1 Ind. App. 364. Compare *Frye v. Moor*, 53 Me. 583.

ized act. Defendant is excused if the breaking away of the water is due to an act of God, vis major, or the wrongful act of a third person.⁴⁷

Whoever places a heavy substance in such a position that it is likely to fall by force of gravitation is liable without further proof of negligence.⁴⁸ Thus, one who maintains a heavy sign over a sidewalk in a frequented part of the city is presumptively negligent, in the absence of proof that it happened out of the ordinary course, if it falls and damages a passer-by.⁴⁹ Liability for an overhanging sign has also been regarded from the point of view of nuisance, independent of negligence.⁵⁰ Where a roof is so constructed that water, snow, and ice which collect upon it from natural causes will, in the ordinary course of things, fall upon an adjoining highway, or upon a neighbor's land, the owner of the building is liable for consequent damages.⁵¹ This would not be a question of reasonable care and diligence in the management of such roof, but of the right to erect and maintain it at all in that shape. He was bound, at his peril, to keep the ice and snow that collected on the roof within his own limits; and, if the shape of his roof was such as necessarily and naturally threw it upon the street, he was responsible for all damages, precisely as if he had, under the same circumstances, thrown it upon the premises of the adjacent owner.⁵² When part of a building falls without any apparent reason, the owner is liable, although he exercised due care in his plans and the selection of architect and contractor. The liability may be regarded as based on nuisance, or on breach of duty to insure safety.⁵³

Fire has been regarded as such a dangerous instrumentality as to

⁴⁷ *Nichols v. Marsland*, L. R. 10 Exch. 255; *Stone v. State*, 138 N. Y. 124, 83 N. E. 733; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Box v. Jubb*, 4 Exch. Div. 76.

⁴⁸ *Welfare v. Railroad Co.*, L. R. 4 Q. B. 693.

⁴⁹ *Railroad Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610. See, also, *Mullen v. St. John*, 57 N. Y. 567.

⁵⁰ *Wood*, Nuis. § 90, and cases cited.

⁵¹ *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84. Cf. *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87.

⁵² *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657. See *Shipley v. Fifty Associates*, 101 Mass. 251, 254, 106 Mass. 194.

⁵³ See *Jager v. Adams*, 123 Mass. 26.

attach liability for damage therefrom, irrespective of negligence.⁵⁴ In England, by statute,⁵⁵ liability for domestic fires has been made dependent on negligence,⁵⁶ but absolute liability for damage by nondomestic fires still continues.⁵⁷ In this country, in all cases, liability is dependent on negligence.⁵⁸

Liability for keeping an explosive has been regarded on the theory of nuisance,⁵⁹ and as a breach of duty to insure safety.⁶⁰ The tendency, however, is to base liability on negligence.⁶¹ Thus, a carrier is not liable for the explosion of a package of nitroglycerin, where he did not know its contents.⁶² Nor is the owner of a boiler purchased from reputable manufacturers liable for an explosion due to unknown and latent defects.⁶³

Whoever owns or keeps animals of a kind likely to do harm does so at his peril, and is liable, on proof of damage, without further proof of negligence.⁶⁴ "If they are such as are naturally mischievous, he shall answer for hurt done by them, without any notice;

⁵⁴ *Smith v. Brampston*, 2 Salk. 644; *Turberville v. Stampe*, 1 *Ld. Raym.* 264; *Anon.*, *Cro. Eliz.* 10.

⁵⁵ 6 Anne, c. 31, §§ 6, 7. As to whether this is part of the common law of the United States: *Spauldin v. Railway Co.*, 30 *Wis.* 110; *Webb v. Railroad Co.*, 49 *N. Y.* 420; *Burton v. Smith*, 13 *Pet.* 464. See, also, *St. 12 Geo. III. c. 73*; 14 *Geo. III. c. 78*, especially section 86.

⁵⁶ *Filliter v. Phippard*, 11 *Q. B.* 347; *Vaughan v. Menlove*, 3 *Bing. N. C.* 468.

⁵⁷ *Jones v. Railroad Co.*, *L. R. 3 Q. B.* 733; *Powell v. Fall*, 5 *Q. B. Div.* 597.

⁵⁸ *Clark v. Foot*, 8 *Johns.* 421; *Dewey v. Leonard*, 14 *Minn.* 153 (*Gil.* 120); *Armstrong v. Cooley*, 5 *Gilman*, 509; *Wood v. Railway Co.*, 51 *Wis.* 196, 8 *N. W.* 214; *Fahn v. Reichart*, 8 *Wis.* 255; *Higgins v. Dewey*, 107 *Mass.* 494; *Bachelder v. Heagan*, 18 *Me.* 32; *Burroughs v. Railroad Co.*, 15 *Conn.* 124; *Hewey v. Nourse*, 54 *Me.* 256.

⁵⁹ *Chicago, W. & V. Coal Co. v. Glass*, 34 *Ill. App.* 364; *Comminge v. Stevenson*, 76 *Tex.* 642, 13 *S. W.* 556. Compare *Heeg v. Licht*, 80 *N. Y.* 579; *Myers v. Malcolm*, 6 *Hill*, 292; *Cheatham v. Shearon*, 1 *Swan*, 213.

⁶⁰ *Clerk & L. Torts*, 39.

⁶¹ *Hadley v. Cross*, 34 *Vt.* 586; *Wellington v. Oil Co.*, 104 *Mass.* 68; *Beauchamp v. Saginaw M. Co.*, 50 *Mich.* 163, 15 *N. W.* 65; *Cosulich v. Oil Co.*, 122 *N. Y.* 118, 25 *N. E.* 259. It is negligence to place gunpowder in the hands of an inexperienced child. *Carter v. Towne*, 98 *Mass.* 557.

⁶² *Nitro-Glycerine Case*, 15 *Wall.* 524.

⁶³ *Losee v. Buchanan*, 51 *N. Y.* 476. See *Binford v. Johnston*, 82 *Ind.* 426.

⁶⁴ Owner of ferocious dog must keep him secure at his peril. *Muller v. McKesson*, 73 *N. Y.* 195. Where a dog jumps into a field without his master's

but, if they are of a tame nature, there must be notice of the ill quality.”⁶⁵ In the leading case (*May v. Burdett*),⁶⁶ a woman was bitten by a monkey. Its owner, knowing its mischievous and ferocious nature, was held liable in case, without an averment of negligence or default on his part in securing or keeping the monkey. Here the owner had actual knowledge of the vicious propensities of the animal.⁶⁷ But, though he “have no particular notice that it did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear,⁶⁸ a wolf,⁶⁹ yea, an ape or a monkey,⁷⁰ if he get loose and do harm to any person, the owner is liable to an action for the damage.”⁷¹ In the absence of knowledge of vicious propensities, the owner is liable only, at common law,⁷² for damage caused by the natural propensity of the animal; and this is to be determined by a consideration of normal disposition. Thus, while it is natural for horses to kick each other, it is not their ordinary nature to kick human beings. Hence, where a horse strayed on a highway, and kicked a child, the owner was not held liable, in the absence of knowledge of the horse’s vicious temper;⁷³ but if, at-

consent, the latter is not liable for trespass. *Brown v. Giles*, 1 Car. & P. 118. See, also, *Tillett v. Ward*, 10 Q. B. Div. 17; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255. A bailment of cattle does not relieve their owner from liability for damage done by their straying from the bailee’s pasture. *Blaisdell v. Stone*, 60 N. H. 507. A liveryman is not liable for defects in a horse hired, where he did not know of and could not have discovered such defects by the exercise of reasonable care. *Copeland v. Draper*, 157 Mass. 558, 32 N. E. 944.

⁶⁵ Holt, C. J., in *Mason v. Keeling* 12 Mod. 332; Holmes, Com. Law, 22; *Buxendin v. Sharp*, 2 Salk. 662. Notice is immaterial if the animal is at the time a trespasser. *Decker v. Gammon*, 44 Me. 323.

⁶⁶ 9 Q. B. 101.

⁶⁷ See, also, *Muller v. McKesson*, 73 N. Y. 195.

⁶⁸ *Marquet v. La Duke*, 96 Mich. 596, 55 N. W. 1006.

⁶⁹ *Manger v. Shipman*, 30 Neb. 352, 46 N. W. 527.

⁷⁰ *May v. Burdett*, 9 Q. B. 101.

⁷¹ 1 Hale, P. C. p. 430; *Jenkins v. Turner*, 1 Ld. Raym. 109; *Mason v. Keeling*, Id. 606. An elephant is in the dangerous class. *Filburn v. Aquarium Co.*, 25 Q. B. Div. 258.

⁷² As illustrations of statutory changes, see *Hussey v. King*, 83 Me. 568, 22 Atl. 476; *Conway v. Grant*, 88 Ga. 40, 13 S. E. 803.

⁷³ *Cox v. Burbidge*, 13 C. B. (N. S.) 430, 441. Compare *Fallon v. O’Brien*, 12 R. I. 518.

though not vicious, it has kicked another animal, he has been held liable.⁷⁴ As to animals *feræ naturæ*, that very fact is notice of vicious propensities; but as to animals *domitæ naturæ*, the owner has notice only of their well-known disposition and habits.⁷⁵

Where the instrument by which harm is done is innocent in itself, and does harm only when put in motion, liability is dependent on care proportioned to the probability of harm.⁷⁶ Thus, great care must be exercised in the management of so dangerous an agency as a railroad train in motion.⁷⁷ A railroad company is bound to adopt and use tried and approved appliances. Failure to provide air brakes may be negligence.⁷⁸ Starting a train suddenly while one is boarding a car is negligence. But a railroad company is not an insurer of safety.⁷⁹ Running trains at a high rate of speed over country crossings is not negligence *per se*,⁸⁰ nor even in a city, in the absence of an ordinance limiting the rate of speed.⁸¹

⁷⁴ *Barnes v. Chapin*, 4 Allen, 444. See, also, *Smith v. Cook*, 1 Q. B. Div. 79; *Meegan v. McKay*, 1 Okl. 59, 30 Pac. 232. Owner of stallion held liable for injuries to mare only in absence of ordinary care. *Meredith v. Reed*, 26 Ind. 334.

⁷⁵ *Van Leuven v. Lyke*, 1 N. Y. 515. See *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *Jackson v. Smithson*, 15 Mees. & W. 563; *Hammond v. Melton*, 42 Ill. App. 186; *Lettis v. Horning*, 67 Hun, 627, 22 N. Y. Supp. 565. As to liability for diseased animals, see *Cooke v. Waring*, 2 Hurl. & C. 332; *State v. Fox*, 79 Md. 514, 29 Atl. 601; *French v. Wilkinson*, 93 Mich. 322, 53 N. W. 530; *Herrick v. Gary*, 83 Ill. 85.

⁷⁶ *Doyle v. Railway Co.*, 77 Iowa, 607, 42 N. W. 555 (coupling pin); *Barnes v. Brown*, 95 Mich. 576, 55 N. W. 439 (rope dragging behind vehicle). Compare *McCaffrey v. Railroad Co.*, 47 Hun, 404; *Frazier v. Lloyd* (Pa. Sup.) 16 Atl. 418 (circular saw); *Parish v. Williams*, 88 Iowa, 66, 55 N. W. 74 (a hammer in use); *Ledig v. Brewing Co.*, 153 Pa. St. 298, 25 Atl. 870 (beer barrels swinging from a wagon). As to law of bicycles, see 47 Alb. Law J. 404; *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132 (use of sidewalks); *Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83 (frightening horses; high rate of speed).

⁷⁷ *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Richardson v. Railroad Co.*, 133 N. Y. 563, 30 N. E. 1148; *Thomas v. Railway Co.*, 86 Mich. 496, 49 N. W. 547.

⁷⁸ *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796.

⁷⁹ *Chicago, K. & W. R. Co. v. Fisher*, 49 Kan. 460, 30 Pac. 462.

⁸⁰ *Childs v. Railroad Co.*, 150 Pa. St. 73, 24 Atl. 341. Compare *Lapsley v. Railroad Co.*, 50 Fed. 172.

⁸¹ *Tobias v. Railroad Co.*, 103 Mich. 330, 61 N. W. 514. The question is

Where electrical currents are involved, liability would seem to be determined by rules of negligence,—that is, by care proportionate to the danger,—and not by the principles involved in the duty to insure safety;⁸² nor in nuisance.⁸³ A live wire, however, is exceedingly dangerous. So that proof of contact therewith and consequent damages makes out a complete case of *prima facie* negligence, and throws the burden on the defendant to show that such wire was in the streets without fault on his part.⁸⁴ Generally, companies using electricity on lines along a street are charged with the highest degree of care, having due reference to existing knowledge, in the construction, inspection, and repair of their wires and poles, and in use of devices to guard against harm.⁸⁵

Same—Knowledge.

The duty to take care “must be determined in all cases by reference to the situation and knowledge of the parties, and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence, with different knowledge, and in changed circumstances.”⁸⁷ “Facts which were known to the defendant, or by use of proper diligence would have been known to a man in his

ordinarily for the jury. *Lederman v. Railroad Co.*, 165 Pa. St. 118, 30 Atl. 725. Making a flying switch in the populous part of a city is negligence. *Railroad Co. v. Smith*, 93 Ky. 449, 20 S. W. 392. And see *Ward v. Railroad Co.*, 85 Wis. 601, 55 N. W. 771.

⁸² *Southwestern Tel. & Tel. Co. v. Robinson*, 1 C. C. A. 684, 50 Fed. 810; *Ahern v. Telegraph Co.*, 24 Or. 276, 33 Pac. 403, and 35 Pac. 549. As to absolute liability, see *Kankakee El. R. Co. v. Whittemore*, 45 Ill. App. 484; *National Tel. Co. v. Baker* [1893] 2 Ch. 186.

⁸³ 3 Minn. Law J. 54, comparing *Cumberland Tel. & Tel. Co. v. Railroad Co.*, 42 Fed. 273, with *Hudson River Tel. Co. v. Railroad Co.*, 135 N. Y. 333, 32 N. E. 148.

⁸⁴ *Uggle v. Railroad Co.*, 160 Mass. 351, 35 N. E. 1126; *Block v. Railroad Co.*, 89 Wis. 371, 61 N. W. 1101.

⁸⁵ *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344; *Arkansas Tel. Co. v. Rattee*, 57 Ark. 429, 21 S. W. 1059. See *Cumberland Tel. & Tel. Co. v. Railroad Co.*, 42 Fed. 273; *Cumberland Tel. & Tel. Co. v. Railroad Co.*, 93 Tenn. 492, 29 S. W. 104. Cf. *Cincinnati I. P. R. Co. v. Telegraph Ass'n*, 48 Ohio St. 390, 27 N. E. 890.

⁸⁷ *Nitro-Glycerine Case*, 15 Wall. 524.

place, come into account as part of the circumstances"⁸⁸ which determine due care. Ordinarily, there is no duty to guard against danger unless one knows, or ought to know, of its existence. Knowledge of danger may be actual or constructive. It is the duty of the owner of places likely to be dangerous to exercise due care to keep them safe. He may be negligent in failing to know of their dangerous condition. Thus, a city may be liable for defects in its streets, of which it had no actual knowledge, where the defect had existed for sufficient time in which to discover and remedy it, and was of such a nature as to be disclosed by appearance, or the ordinary use of the street.⁸⁹ Nine hours has been held a sufficient time in the case of a defect on a much-traveled highway.⁹⁰ What length of time is sufficient to impute notice is a question of fact.⁹¹

Capacity and Class of Parties to Wrong.

The common-law standard of diligence is absolute. It does not vary with the ability of the individual. But the individual is held only to the exercise of such care as can be reasonably expected of persons of the recognized class to which he belongs. The law recognizes three classes of persons: (1) Persons deprived of reason; (2) persons of defective capacity or sense; and (3) ordinary persons.

(1) Persons entirely bereft of reason—unconscious agents, lunatics, or very young children—are not responsible for negligence, and cannot have contributory negligence imputed to them.⁹²

(2) Persons of defective capacity must exercise care proportioned to their capacity. A blind or deaf person must exercise more care

⁸⁸ Pol. Torts, 356; Railroad Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Hoffman v. Water Co., 10 Cal. 413. See cases on liability for damage by animal, *supra*, p. 459.

⁸⁹ Lindholm v. City of St. Paul, 19 Minn. 245 (Gil. 204); Loberg v. Town of Amherst, 87 Wis. 634, 58 N. W. 1048; Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310; Moore v. City of Minneapolis, 19 Minn. 300 (Gil. 258).

⁹⁰ Stellwagen v. City of Winona, 54 Minn. 460, 56 N. W. 51.

⁹¹ Kirk v. Village of Homer, 77 Hun, 459, 28 N. Y. Supp. 1009; City of Chicago v. Fowler, 60 Ill. 322. Seven days has been held not sufficient. City of Chicago v. McCarthy, 75 Ill. 602.

⁹² Twist v. Railroad Co., 39 Minn. 164, 39 N. W. 402; Schnur v. Traction Co., 153 Pa. St. 29, 25 Atl. 650; Chicago City R. Co. v. Wilcox (Ill. Sup.) 24 N. E. 419; Parrott v. Wells, 15 Wall. 524. See, also, *post*, p. 490.

in walking on the streets than one physically sound.⁹³ But one having notice of another's defective capacity must exercise correspondingly greater care to avoid injuring him. With respect to children, there comes a time at which the child is responsible. This period is indefinite, and liability is graduated according to experience. "The measure of a child's responsibility is his capacity to see and appreciate danger; and the rule is that, in the absence of clear evidence of the lack of it, he will be held to such measure of discretion as is usual in those of his age and experience."⁹⁴

(3) In the case of persons neither devoid of reason, nor even of defective capacity, the standard of care is that of the average prudent or reasonable man. It does not vary with the judgment of the individual. It is no defense that a man acted according to his best judgment.⁹⁵ But the fact that a man is called upon to act without opportunity to deliberate must be considered, in determining whether he exercised due care under the circumstances.

Custom and License.

Among the circumstances to be considered in determining what is negligence, the law recognizes existing usage and custom. The usage and custom may amount to almost positive law (as the law of the road, in the absence of statute),⁹⁶ or, falling short of this, it may depend upon general business usage (as in the case of landing of steamboats),⁹⁷ or upon the general practice of the parties in the particular case at issue. Care, with reference to a usage or cus-

⁹³ Fenneman v. Holden, 75 Md. 1, 22 Atl. 1049. See City of Franklin v. Harter, 127 Ind. 446, 26 N. E. 882.

⁹⁴ Huff v. Ames, 16 Neb. 139, 19 N. W. 623; Sioux City & P. R. Co. v. Stout, 17 Wall. 657; Cleveland Rolling-Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466; Frost v. Railroad Co., 64 N. H. 220, 9 Atl. 790 (turntable).

⁹⁵ Vaughan v. Menlove, 3 Bing. (N. C.) 468. And see Berg v. City of Milwaukee, 83 Wis. 599, 53 N. W. 890. Accordingly, neither sex (Simms v. Railroad Co., 27 S. C. 268, 3 S. E. 301; Ridenhour v. Railway Co., 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760; Hassenyer v. Railroad Co., 48 Mich. 205, 12 N. W. 155), nor ignorance (Jones v. Fay, 4 Fost. & F. 525), nor personal ability or skill (see post, 474), affect the standard of duty. Reverie will not excuse failure to look and listen for approaching train. Havens v. Railroad Co., 41 N. Y. 296.

⁹⁶ Post, p. 465.

⁹⁷ Red River Line v. Cheatham, 9 C. C. A. 124, 60 Fed. 517.

tom, is sometimes confused with customary or usual care, but the two things are entirely distinct. On the one hand, if a person exercises usual or customary care, it may be evidence, although not conclusive, of the exercise of diligence.⁹⁹ On the other hand, he must exercise care with reference to a usage or custom, known or which ought to be known, which custom or usage may affect the probability of harm ensuing from a given course of conduct.

Same—Duty to Persons in Public Places.

Due care requires that, as to the use of public highways, regard must be had to the custom or law of the road and to the danger likely to result from ordinary and extraordinary use. Thus where bicycles are not allowed on the sidewalk, pedestrians need not look out for them there.¹⁰⁰ So, turning to the left in passing a vehicle, where the custom is to turn to the right, may be negligence.¹⁰¹ But, where danger can be avoided better by turning to the left, it is one's duty to do so.¹⁰² At all times one must exercise the care of an ordinarily prudent person to avoid harming another. With respect to horses on the highway, care must be exercised to prevent runaways.¹⁰⁴ Leaving a horse unhitched and unattended is prima facie evidence of negligence.¹⁰⁵

⁹⁹ Day v. Lumber Co., 54 Minn. 522, 56 N. W. 243.

¹⁰⁰ Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132. Bicyclist has equal right to vehicles and foot passengers in street. Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545. "Foot passengers have equal rights in the street to those mounted on horseback or driving in carriages. Neither can have a prior idea of right over the other. Both are bound to exercise reasonable care to avoid collision." Stringer v. Frost, 116 Ind. 477, 19 N. E. 331; Belton v. Baxter, 54 N. Y. 245. Bicyclists stand in the same position. Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545. And see 47 Alb. Law J. 404.

¹⁰¹ Earing v. Lansingh, 7 Wend. 185. See Norris v. Saxton, 158 Mass. 46, 32 N. E. 954, as to meeting at junction of streets. See, generally, Damon v. Inhabitants of Scituate, 119 Mass. 66; O'Maley v. Dorn, 7 Wis. 236; Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583. It is not negligence per se to drive on the left of the traveled part of a road, but such fact may be considered in determining whether the driver was reasonably careful. Meservey v. Lockett, 161 Mass. 332, 37 N. E. 310.

¹⁰² Clay v. Wood, 5 Esp. 44; Schimpf v. Sliter, 64 Hun, 463, 19 N. Y. Supp. 644.

¹⁰⁴ Phillips v. Dewald, 79 Ga. 732, 7 S. E. 151.

¹⁰⁵ Henry v. Klopfer, 147 Pa. St. 178, 23 Atl. 337. See, also, Broult v. Han-

Care to be exercised at level railroad crossings has reference to the conduct on the part of the railroad company justifying the assumption that the line is clear, and to the arrangements and surroundings affecting ability to ascertain whether the lines are clear. Thus, when a railroad company maintains a gate at a crossing, leaving it open is an implied assurance that the tracks are clear; and, if a train is in fact approaching, the company is negligent.¹⁰⁶ On the same principle, failure to give customary signals is negligence.¹⁰⁷ So a railroad company may be negligent in failing to provide a gate or a flagman at an exceptionally dangerous crossing, where the tracks cannot be seen from the highway.¹⁰⁸ On the other hand, a traveler must use every reasonable precaution to avoid injury. He must regard the usual rate and times at which trains pass over a given crossing.¹⁰⁹ He should look both ways, and listen.¹¹⁰ The rules are essentially the same as to street-railway companies.¹¹¹

The law recognizes the duty of avoiding interference with highways so as to make them dangerous for ordinary and proper use.¹¹²

son, 158 Mass. 17, 32 N. E. 900; *Edwards v. Railroad Co.*, 148 Pa. St. 531, 23 Atl. 894; *Olson v. Railway Co.*, 81 Wis. 41, 50 N. W. 412, 1096.

¹⁰⁶ *Wilson v. Railroad Co.*, 18 R. I. 491, 29 Atl. 258. A fortiori where the gates were required by the city ordinance. *Missouri Pac. Ry. Co. v. Hackett*, 54 Kan. 316, 38 Pac. 294; *Evans v. Railroad Co.*, 88 Mich. 442, 50 N. W. 386.

¹⁰⁷ *Westaway v. Railway Co.*, 56 Minn. 28, 57 N. W. 222; *Casey v. Railroad Co.*, 78 N. Y. 518. It is immaterial whether the signals are merely customary, or required by statute. *Vandewater v. Railroad Co.*, 74 Hun, 32, 20 N. Y. Supp. 397; *Artz v. Railroad Co.*, 34 Iowa, 153; *Marfell v. Railroad Co.*, 8 C. B. (N. S.) 525.

¹⁰⁸ *Hubbard v. Railroad Co.*, 162 Mass. 132, 38 N. E. 366.

¹⁰⁹ *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134, 15 South. 508; *Elkins v. Railroad*, 115 Mass. 190; *Retan v. Railway Co.*, 94 Mich. 146, 53 N. W. 1094. See, also, *Schaible v. Railway Co.*, 97 Mich. 318, 56 N. W. 565.

¹¹⁰ *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Gorton v. Railway Co.*, 45 N. Y. 660. Failure of the company to give customary signal does not exempt from this duty. *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88.

¹¹¹ *Omaha St. Ry. Co. v. Cameron*, 43 Neb. 297, 61 N. W. 606; *Boerth v. Railroad Co.*, 87 Wis. 288, 58 N. W. 376; *Rohe v. Railroad Co.*, 10 Misc. Rep. 740, 31 N. Y. Supp. 797.

¹¹² See, generally, *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132; *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672; *Jutte v. Bridge Co.*, 146 Pa. St. 400,

Leaving an open and unguarded ditch is actionable negligence.¹¹³ But the duty is to keep the road safe only for customary, not extraordinary, use. Therefore a town was held not liable for the breaking of a bridge under the weight of a steam thresher, where the moving of steam threshers was not an ordinary use of road at the time the bridge was constructed.¹¹⁴

Same—Duty to Person on Defendant's Premises—Trespassers, Licensees and Invited Persons.

"The owner or occupier of real estate owes certain duties to those who come thereon, according to the cause of their entry, and the nature of the danger to which they are exposed: (a) To trespassers, it is only against active injury; (b) to licensees it is to give notice of hidden dangers or traps; (c) while to invited persons (as that term is understood by the law) the owner is bound to use reasonable care, having respect to the person and character of the business to be carried on, to save his guest from injury while upon the premises."¹¹⁵

23 Atl. 235; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520; City of Norwich v. Breed, 30 Conn. 535; Hounsell v. Smyth, 7 C. B. (N. S.) 731; McIntire v. Roberts, 149 Mass. 452, 22 N. E. 13.

¹¹³ Pine Bluff Water & Light Co. v. Derrisseaux, 56 Ark. 132, 19 S. W. 428.

¹¹⁴ Coulter v. Pine Tp., 164 Pa. St. 543, 30 Atl. 490.

¹¹⁵ 33 Am. Law Reg. & Rev. 197. See Benson v. Traction Co., 77 Md. 535, 26 Atl. 973; Pennsylvania R. Co. v. Prie, 96 Pa. St. 256; Sweeny v. Railroad Co., 10 Allen, 372; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221; Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. 539; Hounsell v. Smyth, 7 C. B. (N. S.) 731; Hargreaves v. Deacon, 25 Mich. 1; Indermaur v. Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128; Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552; Galveston Oil Co. v. Morton, 70 Tex. 400, 7 S. W. 756. Where want of ordinary care is not shown, a railroad company is not liable for an injury to a person on its right of way where he had no right to be. Philadelphia & R. R. Co. v. Hummell, 44 Pa. St. 375; Christian v. Railroad Co., 71 Miss. 237, 15 South. 71. Where a railroad company permits persons to cross its tracks at a point not a public crossing, it must exercise ordinary care and give reasonable warning in approaching the crossing. Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. 539. Landowner is not liable to trespasser who falls into excavation made for lawful purpose. Gramlich v. Wurst, 86 Pa. St. 74; nor to licensee, Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369. As to who are invited persons, see Reardon v. Thompson, *supra*. Duty to policemen entering defendant's premises. Parker

SAME—CONTRACT DUTY.

232. While normally a breach of a contract gives rise to a cause of action *ex contractu*, a contract may impose a duty on the part of the defendant, as party to it, for the violation of which the plaintiff may recover *ex contractu* or *ex delicto*, at his option. The common-law liability, however, within the limits allowed by law, is regulated by the terms of the contract, and a party to such contract, being a party plaintiff, is determined in his cause of action by the terms of that contract, so far as the law will sustain them.

All persons contracting to do certain things owe a duty not to injure the person or property of another while in the performance of the contract. That duty does not necessarily depend on, or grow out of, the contract. Thus, if one undertook the construction of a ditch so as to drain the water off another's land, but, instead, the ditch was constructed so as to gather surface water and empty it on his land, the latter may maintain an action of tort for the damage resulting from the negligence, and is not confined to an action for a breach of contract.¹¹⁶

v. Barnard, 135 Mass. 116. See, generally, as to invited persons, *Southcote v. Stanley*, 1 Hurl. & N. 247; *Davis v. Society*, 129 Mass. 367. No duty to protect licensee from hidden defects in machinery. *Larmore v. Iron Co.*, 101 N. Y. 391, 4 N. E. 752. One who is upon another's premises in the performance of a contract between his master and the owner is not a bare licensee. *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311. Generally, as to liability to licensees, see *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731.

¹¹⁶ *Stock v. City of Boston*, 149 Mass. 410, 21 N. E. 871. Generally, as to election to sue *ex contractu* or *ex delicto*, see *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *Aldine Manuf'g Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280; *People v. Wood*, 121 N. Y. 522, 24 N. E. 952; *Township of Buckeye v. Clark*, 90 Mich. 432, 51 N. W. 528.

Applied to Master and Servant.

The duty owed the servant, for example, in respect to the condition of premises and machinery, has been supposed to exist by virtue of contract.¹¹⁷ But duty, if derived from contract at all, is only implied in it; and, if new terms are to be inserted into the agreement, every duty which the master owes might be treated as contractual, and thus the servant might sue the master in contract for assault and battery. The universal trend of authority on analogous cases is to regard such duty as not contractual, but as of the general law.¹¹⁸

Applied to Telegraph Companies.

A telegraph or telephone company is engaged in a quasi public employment, and owes a recognized public duty. Such a company is bound to exercise due diligence both to correctly¹¹⁹ and promptly¹²⁰ transmit the message and to deliver it to the person to whom it is sent.¹²¹

Applied to Bailments.

An action in tort, for negligence, lies against a bailee for breach of recognized duty. The bailee is bound to take care of property intrusted to him. If, without negligence on his part of which the bailor can complain, and without abuse of the terms of this bailment, damage ensues, there can be no recovery.

While failure to return property involved in a bailment may give rise to an action in trover,¹²² the loss of a hired chattel while in the possession of the hirer may be actionable as negligence.¹²³ As has been shown, *Coggs v. Bernard*¹²⁴ established the law as to the

¹¹⁷ *Albro v. Jaquith*, 4 Gray (Mass.) 99; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572.

¹¹⁸ *Marshall v. York, N. & B. Ry. Co.*, 11 C. B. 655.

¹¹⁹ *Cahn v. W. U. Tel. Co.*, 1 C. C. A. 107, 48 Fed. 810; *White v. W. U. Tel. Co.*, 14 Fed. 710.

¹²⁰ *Fleischner v. Pacific Postal Tel. Co.*, 55 Fed. 738.

¹²¹ *W. U. Tel. Co. v. Timmons*, 93 Ga. 345, 20 S. E. 649. But see *New York & W. P. Tel. Co. v. Dryburg*, 35 Pa. St. 298.

¹²² *American Preservers' Co. v. Drescher*, 4 Misc. Rep. 482, 24 N. Y. Supp. 361; *Wallace v. Canaday*, 4 Sneed (Tenn.) 364.

¹²³ *U. S. v. Yukers*, 9 C. C. A. 171, 60 Fed. 641. But see *Cass v. Boston & L. R. Co.*, 14 Allen (Mass.) 448.

¹²⁴ 2 Ld. Raym. 909.

degrees of care, respectively, required in various kinds of bailments. Accordingly, gross negligence may make liable gratuitous bailees of securities left as a special deposit, stolen by a cashier.¹²⁵ And, on the other hand, *assumpsit* may be maintained if the destruction of the property involved in the bailment was occasioned by actionable negligence.¹²⁶

Applied to Carriers.

There can be no question as to the right of one injured in person or property by a common carrier to sue *ex delicto* or *ex contractu*; that is, to sue on the common-law duty arising from the relationship, or on the contract entered into.¹²⁷ And, when he sues *ex delicto*, he does not sue on the agreement, but on the common-law duty to carry safely.¹²⁸ Indeed, the original liability of a common carrier was exclusively *ex delicto*.¹²⁹ The first innovation, the result of which was to allow *assumpsit* to be brought, is said to have been made in 1750 in *Dale v. Hall*.¹³⁰ The obligations and liability of a railroad company are of a general and public character, and do not depend primarily upon the contract between the parties. Therefore, recovery may be had against a railroad company for its failure to care properly for the safety and security of the public, where it would not lie on the contract.¹³¹

Where there is a special contract, varying the liability of the carrier within limits allowed by law, the action is properly brought on the special contract, and not counting in tort upon the public duty of the carrier.¹³²

¹²⁵ *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810.

¹²⁶ *Zell v. Dunkle*, 156 Pa. St. 353, 27 Atl. 38.

¹²⁷ *Orange Co. Bank v. Brown*, 9 Wend. 85. And see *Porter v. Hildebrand*, 14 Pa. St. 129-132; *Nevin v. Pullman, etc., Co.*, 106 Ill. 222.

¹²⁸ *Bretherton v. Wood*, 3 Brod. & B. 54; *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155-162, 26 N. E. 248.

¹²⁹ *Merritt v. Earle*, 31 Barb. 38; *Johnson v. Richardson*, 17 Ill. 303.

¹³⁰ 1 Wils. 281. Cf. *Pontifex v. Midland R. Co.*, 3 Q. B. Div. 23, 47 Law J. Q. B. 28.

¹³¹ *Sawyer v. Rutland & B. R. Co.*, 27 Vt. 370.

¹³² *Bliss*, Code Pl. § 14; *Oxley v. Railway Co.*, 65 Mo. 629; *Boaz v. Central R. Co.*, 87 Ga. 463, 13 S. E. 711.

232a. A contract ordinarily creates no duty, except to parties and privies. Therefore, the normal rule is that no action *ex delicto* may be maintained by strangers to it for its negligent breach.¹³³

Thus, in actions against members of the bar for negligence, it is well settled that only the person with whom the attorney contracts can maintain the action, for it is to him alone that the attorney owes a particular duty.¹³⁴ So, in *Winterbottom v. Wright*,¹³⁵ the defendant hired a mail coach from the postmaster general, and contracted to keep it in repair. A third person also contracted to furnish horses for the coach, and the plaintiff hired to drive it for such third person. The coach broke down, and the plaintiff was injured; and he was not allowed to recover, because, "if we were to hold that the plaintiff could sue in such a case, there is no point at which such action would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty." A further reason assigned is that "the object of the parties in inserting in their contract specific undertakings with respect to the work to be done is to create obligations and duties *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in the contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contract."¹³⁶

¹³³ See *Fowler v. Water-Works Co.*, 83 Ga. 219, 9 S. E. 673. Cf. *New York & W. P. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Heaven v. Pender*, 11 Q. B. Div. 503.

¹³⁴ *Dundee Mortgage & Trust Inv. Co. v. Hughes*, 20 Fed. 39; *Savings Bank v. Ward*, 100 U. S. 195; *Fish v. Kelly*, 17 C. B. (N. S.) 194.

¹³⁵ 10 Mees. & W. 109. See, also, *Miller v. Woodhead*, 104 N. Y. 471, 11 N. E. 57; *Heaven v. Pender*, 9 Q. B. Div. 302; *George v. Skivington*, L. R. 5 Exch. 1.

¹³⁶ *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19. A contractor who has completed a building, and turned it over to the owner, is not liable to one injured by reason of defective construction, since the contractor's duty is only to the owner. *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244.

232b. Neither the contract itself nor its limitations exclude liability to third persons for negligence where it would attach under the logical application of the normal principles of negligence. Actions for damages may be maintained by persons who are neither parties nor privies to a contract, when the injury complained of arises from want of care—

- (a) With respect to a dangerous thing sold;**
- (b) Occurring in the performance of a contract resulting in direct and immediate damage to one's person or property.¹³⁷**

Damage Caused by Dangerous Things.

If a common-law duty results from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract. This applies to articles which are imminently dangerous. Thus, in the celebrated case of *Thomas v. Winchester*,¹³⁸ a manufacturer of and dealer in vegetable extracts for medical purposes was sued by a stranger for damages suffered by him because of the use of one of such preparations, labeled as extract of dandelion, a harmless medicine, but which was, in fact, the extract of belladonna, a poison. It was held that the defendant's negligence had put human life into imminent danger, and that his duty arose out of the nature of the business and the danger to others incident to his mismanagement. He was therefore held liable in damages, although there was no privity between him and the injured party. In *Langridge v. Levy*,¹³⁹ A. bought a gun, which was warranted. He gave this gun to B., who was injured by its explosion. It was held that A. alone could sue in contract, and that B.'s cause of action was in tort.

¹³⁷ *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298.

¹³⁸ 6 N. Y. 397. Cf. *Losee v. Clute*, 51 N. Y. 494, where it was held that the manufacturer was not liable for the explosion of a defective boiler after it had been accepted by vendee. See, also, *Heaven v. Pender*, 11 Q. B. Div 503; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118.

¹³⁹ 2 Mees. & W. 519, 4 Mces. & W. 337; *George v. Skivington*, L. R. 5 Exch. 1. Cf. *Dixon v. Bell*, 5 Maule & S. 198.

Poisons,¹⁴⁰ spoiled food,¹⁴¹ or materials otherwise mischievous or dangerous,¹⁴² which do damage to innocent third persons, attach liability to the vendor or manufacturer only when he has been guilty of negligence.¹⁴³ His duty is not ordinarily absolute, but he must exercise a very high degree of care. He is not liable for latent defects in things sold,—for example, machinery,—but he is liable for obvious defects.¹⁴⁴ “The rule is limited, however, and justly so, to instrumentalities and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger, and to acts that are ordinarily dangerous to life and property.”¹⁴⁵

Damage in Course of Negligent Performance of Contract.

Where, under a contract to which the plaintiff is not a party, damage is done immediately to his person or property by the negligent or otherwise wrongful performance of such contract, he may recover.¹⁴⁶ Thus, an attorney, while not liable on his opinion to persons not parties to a contract, is liable for any wrong he may do to a party in course of the performance of such contract, as for negligence or wrong in seizing goods.¹⁴⁷ So a physician rendering service to a charity patient is liable for injury resulting from carelessness in treatment, although he may be paid by the county.¹⁴⁸

¹⁴⁰ Walton v. Booth, 34 La. Ann. 913; Brown v. Marshall, 47 Mich. 576, 11 N. W. 392. Norton v. Sewall, 106 Mass. 143; Savings Bank v. Ward, 100 U. S. 195; Allan v. State S. S. Co., 132 N. Y. 91, 30 N. E. 482. And see George v. Skivington, L. R. 5 Exch. 1; Bruff v. Mall, 36 N. Y. 200; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154; Davis v. Guarneri, 45 Ohio St. 470, 15 N. E. 350; Loop v. Litchfield, 42 N. Y. 351.

¹⁴¹ Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. 812.

¹⁴² Brass v. Maitland, 6 El. & Bl. 470; Quin v. Moore, 15 N. Y. 432; Elkins v. McKean, 79 Pa. St. 493.

¹⁴³ State v. Fox, 79 Md. 514, 29 Atl. 601.

¹⁴⁴ Helzer v. Kingsland & Douglass Manuf'g Co., 110 Mo. 605, 19 S. W. 630. And see Losee v. Clute, 51 N. Y. 494; Losee v. Buchanan, 51 N. Y. 476; Marshall v. Welwood, 38 N. J. Law, 339; Losee v. Clute, 51 N. Y. 494; Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381.

¹⁴⁵ Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400-402.

¹⁴⁶ Telegraph company is liable to addressee of message for negligence in transmission. New York & W. Printing Tel. Co. v. Dryburg, 35 Pa. St. 208.

¹⁴⁷ Weeks, Attys. p. 628.

¹⁴⁸ Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313. And see Gladwell v. Steggall, 5 Bing. N. C. 733.

Effect of Limitations as to Third Persons.

It has been seen that many limitations on liability which may be regarded and remedied as tortious may be altered by agreement.¹⁴⁹ Such limitations, however, affect only the parties to the contract, and not third persons who may be entitled to recovery for a wrong a part of which is a breach of contractual duty. Thus, limitations in the telegraph contract limiting responsibility to messages repeated, apply to the sender, and not to the recipient.¹⁵⁰

233. Negligence in the performance of a contract includes want of competent skill. Diligence includes competency.¹⁵¹

In general, when a person offers his services to the public in any business, trade, or profession, there is an implied engagement with those who employ him that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by persons in the same business, trade, and profession, and which is ordinarily regarded by the community and by those conversant with that employment as necessary and sufficient to qualify him to engage in such business, trade, or profession, and that he will perform matters intrusted to him diligently and faithfully.¹⁵² He does not guarantee success. As no prudent person would, unless possessed of competent skill, undertake the doing of any act which in the absence of skill would cause great risk of injury to another, the doing of such acts by an unskilled person will amount to negligence. Undertaking to exercise judgment without skill in a matter which requires skill is not a mere error of judgment, but it is negligence.¹⁵³ Therefore negligence includes the want of competent skill, as where

¹⁴⁹ Ante, p. 171, "Discharge by Contract."

¹⁵⁰ Tobin v. W. U. Tel. Co., 146 Pa. St. 375, 23 Atl. 324; New York & W. Printing Tel. Co. v. Dryburg, 35 Pa. St. 298.

¹⁵¹ Graham v. Gautier, 21 Tex. 111.

¹⁵² Odlin v. Stetson, 17 Me. 244; Graham v. Gautier, 21 Tex. 111; Cayford v. Wilbur, 86 Me. 414, 29 Atl. 1117; Leighton v. Sargent, 7 Fost. (N. H.) 400; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767. And see Chase v. Heaney, 70 Ill. 268. Liability of trustees in management of estate, Miller v. Proctor, 20 Ohio St. 442.

¹⁵³ City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Dean v. Keate, 3 Camp. 4.

an incompetent person produces injury in the management of horses,¹⁵⁴ or of a railway train.¹⁵⁵ Where, however, an emergency elicits a volunteer to act without pretending to possess special qualifications, the law recognizes the necessity as forming an exception to the general rule requiring skill.¹⁵⁶

SAME—STATUTORY DUTY.

234. In order that a complainant may recover for negligence in the performance of statutory duty, he must show—

- (a) That he is within the class for whose benefit legislation creating not a purely public duty was designed;¹⁵⁷**
- (b) That there was a negligent violation of statutory requirement by the defendant;**
- (c) That he suffered damage as the proximate result of such violation.**

Purely Public Duty.

If the duty is wholly public, and not at all for the benefit of private individuals, no private person can recover for its violation. Thus, in the celebrated Atkinson Case,¹⁵⁸ a water company, required by statute to keep the pressure in its pipes so as to reach the highest story in the highest house in the area supplied, was not held liable to one who suffered special damage by fire to his house because of insufficient pressure. The act was held to be in the nature of a private legislative bargain, and not to create a duty to such person.¹⁵⁹

¹⁵⁴ Hammack v. White, 11 C. B. (N. S.) 588.

¹⁵⁵ Hutchinson v. York, N. & B. R. Co., 5 Exch. 343.

¹⁵⁶ Higgins v. McCabe, 126 Mass. 13; Beardslee v. Richardson, 11 Wend. (N. Y.) 25; Gladwell v. Steggall, 5 Bing. N. C. 733.

¹⁵⁷ Taylor v. Railroad Co., 45 Mich. 74, 7 N. W. 728.

¹⁵⁸ Atkinson v. Newcastle & G. Water Works Co., L. R. 6 Exch. 404, 2 Exch. Div. 441; Davis v. Clinton Waterworks Co., 54 Iowa, 59, 6 N. W. 128.

¹⁵⁹ See, also, Taylor v. Lake Shore & M. S. R. Co., 45 Mich. 74, 7 N. W. 728; Hayes v. Michigan Cent. R. Co., 111 U. S. 228-240, 4 Sup. Ct. 369.

Private Duty.

The statute or ordinance may create, not only a public duty, but a duty to private persons, a breach of which may be actionable negligence; and yet an individual may not be able to recover, because he is not of the class of persons for whose benefit the statute was designed. Thus, it has been held that an ordinance requiring a railroad company to keep flagmen at street crossings was not intended for the protection of the company's employes, and creates as to them no duty. the violation of which, resulting in damage, is actionable negligence.¹⁶⁰ So an ordinance requiring precautions to be taken to secure the safety of buildings applies only to citizens in them on business, and not to a fireman going there to extinguish a fire.¹⁶¹ And a statute requiring railway companies to block "frogs" in their yards and terminal stations does not render them liable to a trespasser for injuries resulting from a failure to comply therewith.¹⁶² When the statute or ordinance is manifestly for the benefit of a particular class, persons within that class can recover. Thus, where a statute requires the owner of tenement houses to provide them with fire escapes, and he fails to comply therewith, he is liable for damages caused his tenant by breach of this duty.¹⁶³ Damages may be recovered when caused by obstructing a highway in violation of the provisions of a statute prohibiting railway companies from obstructing a street crossing longer than five minutes.¹⁶⁴ Moreover, the courts are inclined to liberally view the purpose of a statute, and to so construe it as to include, not only the class for whose benefit it is primarily intended, but to extend its protection to all who need such protection.¹⁶⁵ In Hayes

¹⁶⁰ Kansas City, Ft. S. & M. R. Co. v. Kirksey, 9 C. C. A. 321, 60 Fed. 999. See, also, Cohoon v. Chicago, B. & Q. R. Co., 90 Iowa, 169, 57 N. W. 727; Dickson v. Omaha & St. L. Ry. Co., 124 Mo. 140, 27 S. W. 476; Hare v. McIntire, 82 Me. 240, 19 Atl. 453.

¹⁶¹ Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113. And see Pauley v. Steam-Gauge & Lantern Co., 131 N. Y. 90, 29 N. E. 999; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182.

¹⁶² Akers v. Chicago, St. P., M. & O. Ry. Co., 58 Minn. 540, 60 N. W. 669.

¹⁶³ Willy v. Mulledy, 78 N. Y. 310.

¹⁶⁴ Patterson v. Detroit, L. & N. R. Co., 56 Mich. 172, 22 N. W. 260. See, also, Parker v. Barnard, 135 Mass. 116; Owings v. Jones, 9 Md. 108-117.

¹⁶⁵ Atchison, T. & S. F. R. Co. v. Reesman, 9 C. C. A. 20, 60 Fed. 376, 373:

v. Michigan Cent. R. Co.,¹⁶⁶ an action was brought by an infant for personal injury sustained because of the alleged negligence of the railroad company in not fencing its track from a park, as required by statute. The statute was held not to be a mere contract for the benefit of the public, but to create a duty, "not to the city as a municipal body, but to the public considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery."

Negligent Violation.

Where a statute has defined precautions to be exercised to avoid doing harm, compliance with such requirements exonerates. There would seem to be no duty of extrastatutory care;¹⁶⁷ but the statutory duty may not exclude an additional common-law duty.¹⁶⁸ No custom or usage will justify the disregard of a positive statutory regulation;¹⁶⁹ nor can the consent¹⁷⁰ or other conduct¹⁷¹ not amounting to contributory negligence¹⁷² be construed into a license justifying such violation of law. An employé has, however, been held to assume the risk incident to known violation of statutory requirements of precaution for his benefit.¹⁷³ A person to whom the statutory duty is owed has a right to assume, in the absence of contrary knowledge, that such duty has been performed.¹⁷⁴

Same—Question for Jury.

On the one hand, the violation of a duty prescribed by a statute or ordinance is regarded as negligence per se, and as entitling an

¹⁶⁶ 111 U. S. 228, 4 Sup. Ct. 369.

¹⁶⁷ New York, L. E. & W. R. Co. v. Leaman, 54 N. J. Law, 202, 23 Atl. 691.

¹⁶⁸ Atchison, T. & S. F. R. Co. v. Hague, 54 Kan. 284, 38 Pac. 257; Durgin v. Kennett (N. H.) 29 Atl. 414.

¹⁶⁹ Simpson v. New York Rubber Co., 80 Hun, 416, 30 N. Y. Supp. 339. See Billings v. Breinig, 45 Mich. 65, 7 N. W. 722.

¹⁷⁰ Knott v. Wagner, 16 Lea, 481, 1 S. W. 155; Thomas v. Quartermaine, 56 Law J. Q. B. 340.

¹⁷¹ San Antonio & A. P. Ry. Co. v. Peterson, 8 Tex. Civ. App. 367, 27 S. W. 969.

¹⁷² Davis v. California Street Cable R. Co., 105 Cal. 131, 38 Pac. 647.

¹⁷³ Post, p. 515, "Master and Servant."

¹⁷⁴ Sickles v. New Jersey Ice Co., 80 Hun, 213, 30 N. Y. Supp. 10; Crumpley v. Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820.

injured party to recover, if no other consideration (as his own negligence, or failure to connect as cause) prevents.¹⁷⁵ On the other hand, there are many authorities which regard such violation not as negligence per se, or as matter of law, but merely as evidence of negligence to be considered in connection with all the circumstances of the case.¹⁷⁶ The statute itself may determine this question.¹⁷⁷ The statute may, for example, prescribe the duty of insuring safety; as to construct a boom so as to keep logs safely. Upon proof of failure to keep logs safely, liability is shown, although there is no evidence of negligence.¹⁷⁸ A law making every railroad company liable for "damages inflicted upon the persons of passengers, while being transported over its road," except where the injury arises from the criminal negligence of the person injured, or "when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice," has been held constitutional.¹⁷⁹

Even in that class of cases which hold a breach of statutory duty to be negligence per se, in actual practice, the question of negligence is still submitted to the jury in the great majority of instances. The jury must ordinarily determine whether there has

¹⁷⁵ *Thomp. Neg.* 419, 1232; *Correll v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 120; *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45; *Dahlstrom v. St. Louis, I. M. & S. R. Co.*, 108 Mo. 525, 18 S. W. 919; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543 (cf. *Wohlfahrt v. Beckert*, 92 N. Y. 490); *Siemers v. Elsen*, 54 Cal. 418; *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105 (cf. *Atchison, T. & S. F. R. Co. v. Elder*, 149 Ill. 173, 36 N. E. 565); *Salisbury v. Herchenroder*, 106 Mass. 458; *Lane v. Atlantic Works*, 111 Mass. 136; *Steele v. Burkhardt*, 104 Mass. 59; *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555; *Parker v. Barnard*, 135 Mass. 116.

¹⁷⁶ *Vandewater v. New York & N. E. R. Co.*, 135 N. Y. 583, 32 N. E. 636; *Cook v. Johnston*, 58 Mich. 437, 25 N. W. 388; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369.

¹⁷⁷ As where failure to free track from combustibles is made prima facie evidence of negligence, *Northern Pac. R. Co. v. Lewis*, 2 C. C. A. 446, 51 Fed. 658. So right of action sometimes expressly depends upon willful violation of act. *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, 10 S. W. 484.

¹⁷⁸ *Brown v. Susquehanna Boom Co.*, 100 Pa. St. 57, 1 Atl. 156.

¹⁷⁹ *Union Pac. R. Co. v. Porter*, 38 Neb. 226, 56 N. W. 808.

been a breach of such duty in fact. Thus, where there is a complete failure and omission to comply with the requirements of law, there may be negligence per se; but if there is an attempt at such compliance which is imperfect originally, or if there be carelessness in the subsequent inspection or maintenance of statutory precautions, and there is dispute with respect to the facts on these points, the decision of such dispute is for the jury. Thus, the jury is called on to pass upon actual observance and other considerations of fact as to statutory requirements of signals,¹⁸⁰ telltales,¹⁸¹ fences and cattle guards,¹⁸² and the rate of speed at which a train or vehicle¹⁸³ is moving, and the like. Moreover, a breach of statutory duty cannot be the basis of recovery, unless it is proximately connected as the cause of the wrong;¹⁸⁴ and the jury determines the question of connection as cause.¹⁸⁵ Such questions are also carried before a jury by the consideration of contributory negligence, or assumption of risk on behalf of the defendant.

Connection as Cause of Harm.

The mere fact that one is a wrongdoer, we have seen, does not disqualify him to recover in tort, unless his wrong is connected as a cause of the damage complained of.¹⁸⁶ This logical application of the general doctrine of cause is extended to the converse proposition. A defendant, although he may have been violating a statutory duty owed to the plaintiff at the time of the alleged wrong, is not liable to him in damages, unless such violation caused the damage. Thus, city ordinances requiring elevators to be built and protected in a certain way, and to be periodically inspected, do not create a civil liability against a person who violates them towards

¹⁸⁰ *Lees v. Philadelphia & R. R. Co.*, 154 Pa. St. 46, 25 Atl. 1041; *McNamara v. New York Cent. & H. R. R. Co.*, 136 N. Y. 650, 32 N. E. 765; *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150, 53 N. W. 216.

¹⁸¹ *Hines v. New York Cent. & H. R. R. Co.*, 78 Hun, 230, 28 N. Y. Supp. 829.

¹⁸² *Parker v. Lake Shore & M. S. Ry. Co.*, 93 Mich. 607, 53 N. W. 834.

¹⁸³ *Lind v. Beck*, 37 Ill. App. 430.

¹⁸⁴ *Post*, p. 487.

¹⁸⁵ *Billings v. Breinig*, 45 Mich. 65, 7 N. W. 722.

¹⁸⁶ *Ericson v. Duluth & L. R. R. Co.*, 57 Minn. 26, 58 N. W. 822; *Newcomb v. Protective Dep't*, 146 Mass. 596, 16 N. E. 555.

one who is injured by an accident that was in no way caused by such violation.¹⁸⁷

VIOLATION OF DUTY.

235. In order that liability may attach for negligent conduct, two steps must be taken: Facts must be shown sufficient to justify an inference of negligence, and that inference must be drawn. Ordinarily, dispute in testimony as to fact, and drawing the inference of negligence therefrom are for the jury; but both matters may be determined by the court as questions of law.

Province of Court and Jury.

Negligence is a mixed question of law and fact, and is therefore ordinarily ultimately determined by the jury. But there are circumstances under which the court may pass upon the sufficiency of the evidence of negligence presented as a matter of law. There are three different elements essential to plaintiff's recovery: (a) The existence of a duty owed by the defendant to the plaintiff; (b) the violation of that duty by the defendant; (c) damage to plaintiff, conforming to legal standards. The absence of any one of these elements is fatal to plaintiff's case, and the existence of each may be determined by the court or the jury, according to circumstances. If the court determines, as a matter of law, that any one of them is absent, then, ipso facto, the absence of negligence is also determined as a matter of law, and it is error to submit it to the jury. But unless the court determines, as a matter of law, that all of them are present, the question of negligence must go to the jury, in order that they may determine as a fact the existence of the other elements.

Same—Questions for Court.

The existence of a duty from defendant to plaintiff is often a question of law for the court. Thus, in the case of instrumentalities so

¹⁸⁷ Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182. See, generally, Hayes v. Railway Co., 111 U. S. 228, 240, 4 Sup. Ct. 369; Union Pac. R. Co. v. McDonald, 152 U. S. 262-283, 14 Sup. Ct. 619; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182; Horn v. Baltimore & O. R. Co., 4 C. C. A. 346, 54 Fed. 301.

dangerous that ownership or custody attaches responsibility despite the exercise of greatest diligence, the inference of duty is a matter of law. So the absence of duty may be determined as a question of law, as in the case of damage by an independent contractor. In the case of contract duty, as where goods are shipped by a common carrier, if the contract is not denied the existence of the duty is a question for the court. The existence of statutory duty is determined by the court, unless the statutes of another state are involved, in which case the statute must be proved as a fact.

The court may also determine whether the damages claimed or proved conform to legal standards. The court may often say that certain damages alleged or proved are too remote, and, of course, if no other damage is shown, there is nothing to go to the jury. The same result follows when the sole damage proved is too trifling, uncertain, or sentimental to be considered.

Same—Questions for Jury.

The existence of any one of the three elements of negligence may be, and usually is, except the existence of statutory duty, a question of fact for the jury. But the jury cannot find the existence of a fact in the absence of any evidence. It has been thought that even a scintilla of evidence showing negligence would take the case to the jury.¹⁸⁸ But the better opinion is that it is the judge's duty to non-suit wherever a verdict for the plaintiff would be clearly against the weight of evidence.¹⁸⁹ The following rules may be stated: Where the facts are undisputed, and are such that all reasonable men must draw the same inference from them, the question of negligence is for the court. Where the facts are in dispute, or where reasonable men may honestly differ as to the inferences to be drawn from them, the question of negligence is for the jury.¹⁹⁰

¹⁸⁸ *Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226, 1 Atl. 217; *Robinson v. Railroad Co.*, 2 Lea, 594; *Dick v. Railroad Co.*, 38 Ohio St. 389; *Mercier v. Mercier*, 43 Ga. 323; *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasants v. Fant*, 22 Wall. 116.

¹⁸⁹ *Wilds v. Railroad Co.*, 24 N. Y. 430; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85. A mere scintilla is not enough. *Dwight v. Insurance Co.*, 103 N. Y. 341, 8 N. E. 654.

¹⁹⁰ *Purtell v. Jordan*, 156 Mass. 573, 31 N. E. 652; *Gavett v. Railroad Co.*, 16 Gray, 501. See, generally, *Callahan v. Warne*, 40 Mo. 131; *Gardner v.*

SAME—BURDEN OF PROOF.

236. The burden of proof is on the plaintiff to show the negligence of the defendant, except—

EXCEPTIONS—(a) Where proof of some contract or undertaking, and damage, makes out a prima facie case;

(b) Where the thing is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care;¹⁹¹ and

(c) Where this rule is changed by statute.

The burden of proving negligence is on the plaintiff.¹⁹² Indeed, so far from presuming negligence without evidence, the law presumes that at least ordinary care was used.¹⁹³ The plaintiff must establish his case by a preponderance of the evidence.¹⁹⁴ The mere happening of an accident is ordinarily not sufficient evidence of negligence to be left to the jury. The plaintiff must show some affirmative evidence of defendant's negligence.¹⁹⁵ It cannot be assumed, in the absence of all explanation, that a train ran over a man, more

Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Crane Elevator Co. v. Lippert, 11 C. C. A. 521. 63 Fed. 942; Brezee v. Powers, 80 Mich. 182, 45 N. W. 130; Hagan v. Railroad Co., 86 Mich. 615, 49 N. W. 509.

¹⁹¹ Seybolt v. Railroad Co., 95 N. Y. 562.

¹⁹² "Where the evidence is equally consistent with either view,—the existence or nonexistence of negligence,—it is not competent for the judge to leave the matter for the jury." Cotton v. Wood, 8 C. B. (N. S.) 568.

¹⁹³ Weiss v. Railroad Co., 79 Pa. St. 387; Lansing v. Stone, 37 Barb. (N. Y.) 15; Brown v. Railway Co., 49 Mich. 153, 13 N. W. 494.

¹⁹⁴ Hayes v. Railroad Co., 111 U. S. 228, 4 Sup. Ct. 369; Philadelphia, W. & B. R. Co. v. Stebbing, 62 Md. 504; Daniel v. Railway Co., L. R. 3 C. P. 216. Need not be beyond a reasonable doubt, Whitney v. Clifford, 57 Wis. 156, 14 N. W. 927; Elliott v. Van Buren, 33 Mich. 49; nor to the "satisfaction of the jury," Stratton v. Railroad Co., 95 Ill. 25.

¹⁹⁵ Hammack v. White, 11 C. B. (N. S.) 588; Curtis v. Railroad Co., 18 N. Y. 534.

than that a man ran against a train.¹⁹⁶ Plaintiff must show that defendant was the cause of the damage. The mere occurrence of an abcess a year after a fall does not show that it was caused thereby.¹⁹⁷

Exceptions—Contract or Undertaking.

With respect to carriers of passengers and of freight, proof of contract, of the commencement of passage or transportation, and of damage, raises a presumption of negligence on the part of the carrier, without further proof on plaintiff's part.¹⁹⁸ On similar principles, it has been held that where a message, delivered to a telegraph company for transmission as an unrepeatd message, is plainly and distinctly written, and such mistake is made in its transmission that it reaches the connecting company, after passing over only a single line, in a materially altered condition, there is, in the absence of explanation, sufficient evidence of negligence to justify a recovery against the company.¹⁹⁹

Res Ipsa Loquitur.

"While it is true, as a general proposition, that the burden of showing negligence on the part of the one occasioning an injury rests in the first instance upon the plaintiff, yet, * * * when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault."²⁰⁰ When the physical facts surrounding an accident in themselves create a reasonable probability that the accident resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence, in conformity with the maxim, "Res ipsa loquitur."²⁰¹ It would seem more accurate to say, not that negligence is presumed from the mere fact of the in-

¹⁹⁶ *Wakelin v. Railway Co.*, 12 App. Cas. 41, 45.

¹⁹⁷ *St. Louis & S. F. Ry. Co. v. Farr*, 6 C. C. A. 211, 56 Fed. 994.

¹⁹⁸ *Hale*, Bailm. & Carr. pp. 517, 354.

¹⁹⁹ *Marr v. W. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496.

²⁰⁰ *Ruger, C. J.*, in *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562. Fall of hydraulic elevator raises presumption of negligence on part of defendant, its owner. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266; *Dehring v. Comstock*, 78 Mich. 153, 43 N. W. 1049.

²⁰¹ *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380, 383.

jury or accident, but, rather, that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without negligence.²⁰² Thus, "whenever a car or train leaves the track, it proves either that the track or the machinery, or some other portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition, and to operate it with the necessary prudence and care, has in some respect violated this duty; and the court may properly charge that such owner was bound to show some explanation of the cause of the accident."²⁰³ So, in the leading English case of *Byrne v. Boadle*,²⁰⁴ a barrel of flour fell from a warehouse, and struck the plaintiff, who was lawfully passing on a public street; and in *Kearney v. Railway Co.*,²⁰⁵ a brick fell from a bridge and struck and injured the plaintiff. It was held that the maxim, "*Res ipsa loquitur*," applied to the cases. In *Mullen v. St. John*,²⁰⁶ the walls of a building, without any special circumstances of storm and violence, fell into one of the streets of the city of Brooklyn, knocking down a woman who was on the sidewalk, and seriously injuring her. Dwight, C., said: "There was some evidence tending to show that it was out of repair. Without laying any stress upon the affirmative testimony, it is as impossible to conceive of this building so falling, unless it was badly constructed or in bad repair. as it is to suppose that a seaworthy ship would go to the bottom in a tranquil sea and without collision. The mind, necessarily, seeks for a cause for the fall. That is apparently the bad condition of the structure. This, again, leads to the inference of negligence, which the defendant should rebut."

Statutory Changes.

Many statutes have changed the common-law rule of the various states as to the matter of proof of negligence. New rules have been directly introduced. Thus, it has been enacted that the burden is on the owners of reservoirs to exonerate themselves by rebut-

²⁰² *Huey v. Gahlenbeck*, 121 Pa. St. 238, 15 Atl. 520; *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. 549; *Holbrook v. Railway Co.*, 12 N. Y. 236.

²⁰³ *Grover, J.*, in *Edgerton v. New York & H. R. Co.*, 39 N. Y. 227, 229.

²⁰⁴ 2 Hurl. & C. 722, 33 Law J. Exch. 13.

²⁰⁵ L. R. 6 Q. B. 759-762.

²⁰⁶ 57 N. Y. 567.

ting the statutory presumption of negligence from the escape of waters.²⁰⁷ So a presumption that damages produced by a railroad company to persons, servants, strangers, or property, in some states, is by statute created from the happening of an accident.²⁰⁸ Statutes raising a presumption of negligence from the starting of fires are constitutional.²⁰⁹

237. The burden of showing contributory negligence is generally, but not invariably, held to be on the defendant.

It is a generally recognized rule that contributory negligence is a defense, to be specially pleaded;²¹⁰ and that the burden is on the defendant to establish contributory negligence by evidence.²¹¹ He may also avail himself of any evidence given by the plaintiff.²¹² But the defense may be founded on facts shown by the plaintiff's evidence alone.²¹³ And if the evidence shows the plaintiff to be guilty of contributory negligence, he cannot recover.²¹⁴ On the other hand, however, in some jurisdictions this rule is not in force, and the plaintiff must aver²¹⁵ and prove²¹⁶ that he exercised due care, or was not guilty of contributory negligence.

²⁰⁷ *Larimer County Ditch Co. v. Zimmerman*, 4 Colo. App. 78, 34 Pac. 1111.

²⁰⁸ *Laws Fla.* 1890, p. 113, c. 40; *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. So in Georgia. *Georgia Midland & G. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. 580.

²⁰⁹ *Campbell v. Missouri Pac. Ry. Co.*, 121 Mo. 340, 25 S. W. 936.

²¹⁰ *Union Pac. Ry. Co. v. Tracy*, 19 Colo. 331, 35 Pac. 537; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *Willis v. City of Perry* (Iowa) 60 N. W. 727.

²¹¹ *Hough v. Railway Co.*, 100 U. S. 213; *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 14 S. Ct. 239; *Downey v. Pittsburg, A. & M. Traction Co.*, 161 Pa. St. 131, 28 Atl. 1019; *Card v. Eddy* (Mo. Sup.) 24 S. W. 746; *Merrill v. Eastern R. Co.*, 139 Mass. 252, 29 N. E. 666; *Dugan v. Chicago, St. P., M. & O. Ry. Co.*, 85 Wis. 609, 55 N. W. 894.

²¹² *Waterman v. Chicago & A. R. Co.*, 82 Wis. 613, 52 N. W. 247; *Washington & G. R. Co. v. Harmon's Adm'r*, 147 U. S. 571, 13 Sup. Ct. 557.

²¹³ *Horn's Adm'r v. Baltimore & O. R. Co.*, 4 C. C. A. 346, 54 Fed. 301, 6 U. S. App. 381.

²¹⁴ *Smith v. Chicago, M. & St. P. Ry. Co.* (S. D.) 55 N. W. 717; *McMurtry v. Louisville, N. O. & T. R. Co.*, 67 Miss. 601, 7 South. 401.

²¹⁵ *Terre Haute St. Ry. Co. v. Tappenbeck*, 9 Ind. App. 422, 36 N. E. 915.

²¹⁶ *Lee v. Troy Citizens' Gas Light Co.*, 98 N. Y. 115; *Pittsburgh, C. & St.*

SAME—EVIDENCE.

238. Negligence is a conclusion, to be drawn from facts proved, and not a matter to be proved, ordinarily—

- (a) By expert and opinion evidence; or**
- (b) By evidence as to custom.**

Expert and Opinion Evidence.

Negligence, as has been seen, is an inference drawn by the jury from the facts in evidence. It is not, ordinarily, the subject of direct proof.²¹⁷ Circumstantial evidence is sufficient.²¹⁸ The premises from which it follows may be shown by direct testimony, but the wrong itself is a conclusion, to be drawn, not proved.²¹⁹ Therefore evidence should be confined to showing facts and circumstances, but not conclusions.²²⁰ Witnesses who are not experts are confined in their testimony to statements of facts. They are not allowed to give opinions as to matters requiring skill or knowledge, because they are not experts;²²¹ and as to other classes of matters, because the inference from the fact is to be drawn, not by them, but by the jury. Therefore, for example, it is not competent for a witness to state that he used all the means he had to avoid

L. Ry. Co. v. Bennett, 9 Ind. App. 92, 35 N. E. 1033. But see *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Stone v. Dry-Dock, E. B. & B. Ry. Co.*, 115 N. Y. 111, 21 N. E. 712.

²¹⁷ *Callahan v. Warne*, 40 Mo. 132-137; post, p. —. Et vide *Illinois Cent. Ry. v. Cragin*, 71 Ill. 177; *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa. 121; *Dobbins v. Brown*, 119 N. Y. 188, 193, 23 N. E. 537.

²¹⁸ *Waycross Lumber Co. v. Guy*, 89 Ga. 148, 15 S. E. 22; *Rosenfield v. Arrol*, 44 Minn. 395, 46 N. W. 768.

²¹⁹ See *Wilson v. Reedy*, 33 Minn. 503, 24 N. W. 191; *Lester v. Town of Plattsford*, 7 Vt. 158; *Pennsylvania Co. v. Stoelke*, 104 Ill. 201.

²²⁰ *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469; *Simmons v. St. Paul & C. Ry. Co.*, 18 Minn. 184-194 (Gil. 168); *Alton Lime & Cement Co. v. Calvey*, 47 Ill. App. 343. It is beyond the scope of this book to consider when expert evidence is admissible and when it is not. See *White v. Ballou*, 8 Allen (Mass.) 408; *Wood v. Railway Co.*, 51 Wis. 196, 8 N. W. 214; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.

²²¹ *Peteler Portable Ry. Manuf'g Co. v. Northwestern Adamant Manuf'g Co.*, 60 Minn. 127, 61 N. W. 1024. Cf. *Ouillet v. Overman Wheel Co.*, 162 Mass. 305, 38 N. E. 511.

the accident. He should state what means were at hand.²²² It is not clear to what extent an expert witness can express his opinion. He cannot usurp the function of the jury by testifying that certain conduct was "negligent" or "unsafe," and the like.²²³ But there is a manifest tendency to relax the rigid operation of the rule.

Custom and Usage.

Evidence that plaintiff's conduct was in accordance with established custom and usage is not conclusive that it was not negligent. Such general usage may itself be negligent. The standard of care is absolute. No custom justifies conduct negligent in law. Such evidence, however, has been held admissible as tending to show what is ordinary care.

DAMAGES.

239. A cause of action for negligence cannot be made out without proof of damage of the kind required by law. Damage is the gist of the wrong.

It may be stated as axiomatic that no negligence will be actionable unless it results in an injury or damage.²²⁴ Thus an attorney's error, arising from carelessness, is not the basis of recovery against him unless it produce damage.²²⁵ The plaintiff is confined to proof of such damages as he has pleaded. If special damages are not pleaded, they may not be recovered.²²⁶ So if the proof fails as to damages in toto, there can be no recovery. The damages pleaded and proved must comply with the legal standard. If they are too petty, the law will apply the maxim, "De minimis non curat lex." If they are purely sentimental, they will not complete the cause of action. And so, if they be remote, the plaintiff may show the other

²²² *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Pennsylvania Co. v. Stoelke* (1882) 104 Ill. 201; *Michigan Cent. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243.

²²³ Generally, as to expert testimony, see *Neubauer v. Railroad Co.*, 60 Minn. 130, 61 N. W. 912; *Butler v. Railroad Co.*, 87 Iowa, 206, 54 N. W. 208; *Hankins v. Watkins*, 77 Hun, 360, 28 N. Y. Supp. 867; *Mantel v. Railway Co.*, 33 Minn. 62, 21 N. W. 853.

²²⁴ *Bluedorn v. Missouri Pac. R. Co.* (Mo. Sup.) 24 S. W. 57-60.

²²⁵ *Hinckley v. Krug* (Cal.) 34 Pac. 118.

²²⁶ *Hinckley v. Krug* (Cal.) 34 Pac. 118.

two elements of negligence, and for failure to show the third—proximate damage—will fail to recover.²²⁷

CONTRIBUTORY NEGLIGENCE.

240. To maintain successfully an action for negligence the ordinary rule is that it must appear that the injury was occasioned by actionable negligence on the defendant's part, and it must not appear that there was contributory negligence on the plaintiff's part.²²⁸ But contributory negligence is no defense to a willful or wanton wrong.²²⁹

The doctrine of contributory negligence seems to be founded upon these considerations: (1) The mutual wrong and negligence of the parties and the reluctance of the law to attempt an apportionment of the wrong between them. (2) The principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong. (3) The policy of making the personal interests of parties dependent upon their care and prudence. (4) The logical necessity of recognizing that, if the plaintiff's own negligence caused the damage, the defendant is not connected as the juridical cause. Such considerations seem to control courts at present, rather than the misleading application of the maxim, "In pari delicto potior est conditio defendentis."²³⁰

Analogy to the Defendant's Negligence.

Negligence, as the word is commonly used, is the tort of the defendant; but much superficial criticism has arisen from a failure to attend adequately to the similarity of the plaintiff's negligence, or contributory negligence, and that of the defendant. In the consideration of the general subject upon this point, the negligence of the

²²⁷ Negligence resulting merely in fright is not actionable. *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340.

²²⁸ *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401.

²²⁹ *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159.

²³⁰ *Davis v. Guarnieri*, 45 Ohio St. 470-489, 15 N. E. 350; *Pol. Torts*, 360; *Wakelin v. Railway Co.*, 12 App. Cas. 41.

plaintiff and the negligence of the defendant have intentionally not been separated. In many respects they are identical. Both involve the exercise of care proportionate to the circumstances, whenever a duty is placed on either party to exercise such care.²³¹ But, on the one hand, the duty of the plaintiff to exercise care is a negative one. The obligation is imperfect. Its violation is not actionable. He cannot be sued for a breach of such duty. On the other hand, unless he has been guilty of a breach of duty, the question of contributory negligence cannot arise. Any damage resulting from his conduct, not otherwise actionable, is *damnum absque injuria*. If one negligently and proximately contributes to his injury, he cannot recover, no matter how negligent the defendant may have been, unless such negligence is so gross as to imply a willful intention to inflict the injury.²³² But when the harm is intentional, as in cases of assault and battery,²³³ or is the result of willful or wanton negligence,²³⁴ it does not avail to prevent recovery. For essentially the same reason, contributory negligence is no defense to an action for nuisance.²³⁵

SAME—ELEMENTS OF CONTRIBUTORY NEGLIGENCE.

241. To make out the defense of contributory negligence, the plaintiff's conduct must have the three essential elements of negligence; i. e.:

- (a) A duty to exercise care;**
- (b) A violation of that duty in fact; and**
- (c) Connection as cause of the damage complained of.**

²³¹ *Brick v. Bosworth*, 162 Mass. 334, 39 N. E. 36; *Martin v. Railroad Co.*, 23 Wis. 437.

²³² *Carrington v. Louisville & N. R. Co.*, 88 Ala. 472, 6 South. 910; *Menger v. Laur*, 55 N. J. Law, 205, 26 Atl. 180.

²³³ *Ruter v. Foy*, 46 Iowa, 132; *Steinmetz v. Kelly*, 72 Ind. 442.

²³⁴ *Florida South. R. Co. v. Hirst*, 30 Fla. 1, 11 South. 506; *Brown v. Searboro*, 97 Ala. 316, 12 South. 289; *Lake Shore & M. S. R. Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692; *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447; *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29.

²³⁵ *Philadelphia & R. R. Co. v. Smith*, 12 C. C. A. 384, 64 Fed. 679. But see *Mayor & City Council of Baltimore v. Marriett*, 66 Am. Dec. 326.

242. The duty of exercising care to avoid injury includes, inter alia—

- (a) The duty of not voluntarily exposing one's person or property to harm.**
- (b) The duty of avoiding harm before or after the damage is done, when voluntary and deliberate action is allowed by circumstances.**

243. The duty of exercising care does not require one to anticipate a wrongful act.

Exposure to Danger.

The care to be exercised by the plaintiff is governed by the same principles which determine the negligence of the defendant. It varies with the apparent risk. The plaintiff may be negligent in exposing himself to known dangers, or dangers which he should know.²³⁶ Thus the plaintiff may be negligent in interfering with a dog fight.²³⁷ If a drunken man goes to sleep on a railway track, he takes his chances of being killed before his peril is discovered and averted.²³⁸ So, where a brakeman deliberately put his foot into an unblocked frog, and, before he could extricate it, was killed, his recklessness will prevent a recovery.²³⁹ But a pedestrian is not necessarily negligent in attempting to pass over a road which he knows to be dangerous, provided a man of ordinary intelligence would reasonably believe that he could go there.²⁴⁰

²³⁶ *Lebanon Light, Heat & Power Co. v. Leap*, 139 Ind. 443, 39 N. E. 57.

²³⁷ *Matteson v. Strong*, 159 Mass. 497, 34 N. E. 1077; *Lynch v. McNally*, 73 N. Y. 350.

²³⁸ *O'Keefe's Adm'x v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 467. It is not contributory negligence to turn cattle into one's own pasture, although one knows that a railroad company has not complied with a statute requiring fences. *Donovan v. Railroad Co.*, 89 Mo. 147, 1 S. W. 232; *Schmolze v. Chicago, M. & St. P. Ry. Co.*, 83 Wis. 659, 53 N. W. 743, and 54 N. W. 106.

²³⁹ *Southern Pac. Co. v. Seley*, 152 U. S. 145-156, 14 Sup. Ct. 530. See, generally, *Colvin v. Peabody*, 155 Mass. 104, 29 N. E. 59; *McWilliams' Case*, 31 Mich. 276; *Guggenheim's Case*, 57 Mich. 488, 24 N. W. 827; *Id.*, 66 Mich. 157, 33 N. W. 161; *Little's Case*, 78 Mich. 207, 44 N. W. 137; *Richmond's Case*, 87 Mich. 374, 49 N. W. 621.

²⁴⁰ *Skjeggerud v. Railway Co.*, 38 Minn. 61, 35 N. W. 572; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091.

Avoiding Threatened Danger before Damage is Done.

A failure, under ordinary circumstances, to make diligent use of available means to avoid a known or apprehended danger, when it is apparent that if such means had been used the danger would have been averted, will be regarded as contributory negligence.²⁴¹ But where there are two or more different lines of action, any one of which may be taken, and a person of ordinary skill, in the presence of imminent danger, is compelled to choose one or the other, and does so in good faith, the mere fact that it is afterwards discovered, by the result, that his choice was not the best means of escape, or that no harm would have resulted if he had done nothing, such choice cannot be imputed to him as negligence.²⁴² This is clearly true where the danger to which he is exposed is the result of another's negligence.²⁴³ Thus, if a passenger jump,²⁴⁴ or does not jump,²⁴⁵ from a moving car, train, or engine, to avoid an impending collision, or other danger,²⁴⁶ he is not guilty of contributory negligence, and the act will not bar his recovery. Or if a woman in terror spring aside to avoid a threatened danger from an express wagon, and injures herself against a wall, she can recover, although she would have received no injury, had she remained passive on the sidewalk.²⁴⁷ But the sudden peril which will excuse what would otherwise be contributory negligence on the part of the plaintiff must ordinarily have been caused by the action of the defendant, and not of a third person.²⁴⁸ However, negligence cannot be imputed by law to a person in his effort to save the life of another in extreme

²⁴¹ *Green v. Louisville, N. O. & T. R. Co.* (Miss.) 12 South. 826; *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209; *Keefe v. Chicago & N. W. Ry. Co.* (Iowa) 60 N. W. 503; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85.

²⁴² *Schultz v. Chicago & N. W. R. Co.*, 44 Wis. 638; *Stackman v. Chicago & N. W. Ry. Co.*, 80 Wis. 428, 50 N. W. 404. But see *Baltzer v. Chicago, M. & N. R. Co.*, 83 Wis. 459, 53 N. W. 885; *Toledo, W. & W. Ry. Co. v. O'Connor*, 77 Ill. 391.

²⁴³ *Kreider v. Lancaster, E. & M. Turnpike Co.*, 162 Pa. St. 537, 29 Atl. 721.

²⁴⁴ *Georgia Railroad & Banking Co. v. Rhodes*, 56 Ga. 645; *Eckert v. Railroad Co.*, 43 N. Y. 502.

²⁴⁵ *Spaulding v. W. N. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134.

²⁴⁶ *Piper v. Minneapolis St. Ry. Co.*, 52 Minn. 269, 53 N. W. 1060.

²⁴⁷ *Coulter v. Express Co.*, 56 N. Y. 585.

²⁴⁸ *Trowbridge's Adm'r v. Danville Street-Car Co.* (Va.) 19 S. E. 780.

peril, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.²⁴⁹ Such exception to ordinary liability for failure to avoid harm does not exist where a person voluntarily and negligently brings an injury on himself, or puts himself in a place of danger.²⁵⁰

Avoiding Unnecessary Damage after Injury.

After injury has occurred because of the defendant's negligence, the plaintiff must take care to avert what harm he can, and, if he fails so to do, his own carelessness becomes an efficient cause, and he, and not the defendant, should suffer for such subsequent negligence. Therefore, in an action to recover damages done to the plaintiff's premises by fire alleged to have been negligently started on the defendant's land, it appearing that the plaintiff discovered the fire shortly after it reached his premises, and neglected to extinguish it, though he could have done so, it was held that he had no right to neglect the obvious means of lessening the damage, and that he could not recover for any loss sustained by the fire subsequent to the time he had discovered it and neglected to extinguish it.²⁵¹ In an action for personal injury the defendant may show that the injury was enhanced by the plaintiff's continued use of intoxicating liquors,²⁵² or that the plaintiff's imprudence caused new injury.²⁵³

No Duty to Anticipate Negligence.

On the other hand, the law recognizes no duty to anticipate the negligence of others. The presumption is that every person will perform the duty enjoined by law or imposed by contract.²⁵⁴ Therefore,

²⁴⁹ *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *Cottrill v. Chicago, M. & St. P. Ry. Co.*, 47 Wis. 634, 3 N. W. 376; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 28 N. E. 172; *Gibney v. State*, 137 N. Y. 1, 33 N. E. 142.

²⁵⁰ *Vreeland v. Chicago, M. & St. P. Ry. Co. (Iowa)* 60 N. W. 542.

²⁵¹ *Talley v. Courter*, 93 Mich. 473, 53 N. W. 621; *Hogle v. New York Cent. & H. R. R. Co.*, 28 Hun, 363; *Loker v. Damon*, 17 Pick. 284; *Krum v. Anthony*, 115 Pa. St. 431, 8 Atl. 598.

²⁵² *Bogges v. Metropolitan St. Ry. Co.*, 118 Mo. 328, 23 S. W. 159, and 24 S. W. 210.

²⁵³ *Carpenter v. McDavitt*, 53 Mo. App. 393. And see *City of Galesburg v. Rahn*, 45 Ill. App. 351; *Childs v. New York, O. & W. Ry. Co.*, 77 Hun, 539, 28 N. Y. Supp. 894; *Hitchcock v. Burgett*, 38 Mich. 501.

²⁵⁴ *Engel v. Smith*, 82 Mich. 1, 46 N. W. 21; *Thomas v. Railway Co.*, 8 Fed. 729.

a repairer has the right to rely upon compliance with an ordinance requiring insulation of wires, and is bound to look for patent defects, only.²⁵⁵ On the same principle, a teamster has a right to assume that an engine driver will use ordinary care.²⁵⁶ Even children are presumed to know of statutory duty. A boy of 10 is presumed to know of the statutory duty of a railway company to keep a crossing in safe condition.²⁵⁷ He may act on conventional invitation to go over a public crossing.²⁵⁸

244. In order that the plaintiff's contributory negligence may bar his recovery, it must be connected as at least a part of the legal cause of the damage.²⁵⁹

245. There may be a recovery, notwithstanding mutual negligence on the part of the plaintiff and the defendant—

- (a) If the damage would have happened although the plaintiff had been in no wise negligent;
- (b) If the defendant, after he has discovered the danger to which the plaintiff is exposed by his own negligence, refuses or neglects to exercise due care, under the circumstances, to avoid harm.²⁶⁰

The requirement that contributory negligence, to bar the right of action, must be the proximate cause, without which the damage would not have occurred, is the logical application of the general principle that the plaintiff's wrongdoing, in order to disentitle him

²⁵⁵ *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 11 South 51.

²⁵⁶ *Hobson v. New Mexico & A. R. Co.* (Ariz.) 11 Pac. 545.

²⁵⁷ *Louisville, N. A. & C. R. Co. v. Red*, 47 Ill. App. 662.

²⁵⁸ *Faulk v. Central R. & B. Co.*, 91 Ga. 300, 18 S. E. 304.

²⁵⁹ *Missouri Pac. Ry. Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 925; *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555.

²⁶⁰ *Carrico v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 389, 14 S. E. 12. The following are leading cases on contributory negligence: *Nashua Iron & Steel Co. v. Worcester & Nashua R. Co.*, 62 N. H. 159; *Davies v. Mann*, 10 Mees. & W. 546; *Butterfield v. Forrester*, 11 East, 60; *Stiles v. Geesey*, 71 Pa. St. 439; *Murphy v. Deane*, 101 Mass. 455, 466; *Radley v. Railroad Co.*, 1 App. Cas. 754; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Norris v. Litchfield*, 35 N. H. 271.

to recover, must be the cause, in law, of the damage. If the wrong be merely collateral, it does not affect the right to legal redress.²⁶¹ Thus, it would be manifestly absurd to hold that if a passenger was sitting with his arm out of a window, and the injury inflicted would have been just the same if his elbow had been inside of the window, he could not recover, on account of his position.²⁶² So, if one be negligent in boarding a moving train, this does not affect his right to recover for damages consequent upon the violence of the brakeman in pushing him off the car.²⁶³ And a surgeon called to set a leg carelessly broken will not be heard to say, in an action for his own carelessness in treating his patient, that the latter's negligence in breaking his leg caused the crooked or shortened limb.²⁶⁴ On the other hand, a person is not responsible for damages proximately caused by any person except himself. If the damage complained of was legally caused by the plaintiff, he must bear it, as the consequence of his own act. In such a case, and in case the damage was caused by a third person,²⁶⁵ the defendant is not a legal cause, and cannot be logically held responsible.

Connection as Cause.

The term "proximate cause," in this connection, the English authorities do not regard as the best possible term. It is suggested that "decisive cause" or "decisive antecedent" would convey the meaning better,²⁶⁶ and that "where the respective negligences are equal, the party who was the 'efficient cause' is responsible."²⁶⁷ The supreme court of the United States uses the terms "proximate," "direct," and "efficient."²⁶⁸

²⁶¹ *Norris v. Litchfield*, 35 N. H. 271.

²⁶² 2 *Wood, Ry. Law*, 1257; *Gulf, C. & S. F. Ry. Co. v. Danshank*, 6 Tex. Civ. App. 385, 25 S. W. 295. Et vide *Loftus v. Inhabitants of North Adams*, 160 Mass. 161, 35 N. E. 674; *Ward v. Chicago, St. P., M. & O. Ry. Co.*, 85 Wis. 601, 55 N. W. 771.

²⁶³ *Reed v. Pennsylvania R. Co.*, 56 Fed. 184; *Welch v. Wesson*, 6 Gray, 505.

²⁶⁴ *Lannen v. Albany Gaslight Co.*, 44 N. Y. 459-463.

²⁶⁵ *Arey v. City of Newton*, 148 Mass. 598, 20 N. E. 327.

²⁶⁶ *Pol. Torts*, § 380.

²⁶⁷ *Clerk & L. Torts*, 383.

²⁶⁸ *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Railroad Co. v. Jones*, 95 U. S. 439.

Whatever phrase be employed, however, care should be used to avoid requiring the contributory negligence on the part of plaintiff to have "materially" contributed to the injury. "Courts are inclined to regard as error any limitation upon the effect of any degree of contributory negligence of the plaintiff as defeating his right of recovery."²⁶⁹

Perhaps the most philosophical statement of the law of contributory negligence to be found is that of Mr. Innes:²⁷⁰ "If a person is harmed by the negligence of another, and he has by his own conduct contributed to bring about the harm, he is still entitled to redress from the other person, if he was unable to avoid the consequences of the other person's conduct."²⁷¹ If a person is harmed by the negligence of another, and he, by his own conduct, contributed to bring about the harm, and if he was able to avoid the consequences of the negligence of the other person, but did not avoid them, he is still entitled to redress, if the other person was able to avoid the effects of the conduct of the person harmed, but did not avoid them."²⁷² If a person is harmed by the negligence of another, and he has by his own conduct contributed to bring about the harm, if he was able to avoid the consequences of the conduct of the other person, but did not do so, and the other person was not able to avoid the effects of the conduct of the person harmed, the person harmed is not entitled to redress."²⁷³

²⁶⁹ *Monongahela City v. Fischer*, 111 Pa. St. 9, 2 Atl. 87.

²⁷⁰ *Innis*, Torts, c. 5, § 123, p. 136.

²⁷¹ *Davies v. Mann*, 10 Mees. & W. 545; *Butterfield v. Forrester*, *supra*.

²⁷² *Radley v. London & N. W. R. Co.*, 1 App. Cas. 754, 46 Law J. Exch. 573. See, also, *Davies v. Mann*, 10 Mees. & W. 545.

²⁷³ *Mangan v. Atterton*, 4 Hurl. & C. 388 (criticised by Cockburn, J., in *Clark v. Chambers*, 3 Q. B. Div. 327); *Abbott v. Macfie*, 2 Hurl. & C. 744; *Neal v. Gillett*, 23 Conn. 437. See, also, *Becker v. Janinski* (Com. Pl.) 15 N. Y. Supp. 675; *Brown v. Marshall*, 47 Mich. 576, 11 N. W. 392. Compare *Murdock v. Walker*, 43 Ill. App. 590; *Du Bois v. Decker*, 130 N. Y. 325, 29 N. E. 313.

SAME—COMPARATIVE NEGLIGENCE.

246. The doctrine of comparative negligence is not generally recognized. Courts decline to apportion damage according to the blame.

If one is guilty of gross negligence, it has been held that he cannot set up a trifling negligence or inadvertence on the part of another as a defense.²⁷⁴ Therefore, if a railroad company is grossly negligent at a railroad crossing, the slight negligence of a youthful driver will not deprive him of his right to damages.²⁷⁵ But, while some cases have fully recognized the doctrine of comparative negligence, and have undertaken to strike a legal balance between the negligence of the two persons,²⁷⁶ the general trend of opinion is to determine the defendant's liability by the test of proximate, efficient, or distinctive cause.²⁷⁷ Even in Illinois, the latest decisions no longer recognize the doctrine of comparative negligence.²⁷⁸ The true rule seems to be that "it is an incontestable principle that where the injury complained of is the product of mutual or concurrent negligence, no action for damages will lie. The parties being mutually at fault, there can be no apportionment of damages. The law has no scale to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief."

²⁷⁴ 4 Am. & Eng. Enc. Law, 367; Bailey, Mast. & S. 403.

²⁷⁵ Schindler v. Milwaukee, L. S. & W. Ry. Co., 87 Mich. 400, 49 N. W. 670. Compare Long v. Township of Milford, 137 Pa. St. 122, 20 Atl. 425, with Mattimore v. City of Erie, 144 Pa. St. 14, 22 Atl. 817; Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478-497.

²⁷⁶ Jacobs' Case, 20 Ill. 478; North Chicago Rolling-Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Chicago, B. & Q. R. Co. v. Warner, 123 Ill. 38, 14 N. E. 206; Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800; Kentucky Cent. Ry. Co. v. Smith, 93 Ky. 449, 20 S. W. 392. The admiralty rule is to divide damage. The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29. Cf. Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264; Atlee v. Packet Co., 21 Wall. 389.

²⁷⁷ Ante, p. 45. Et vide Rowen v. New York, N. H. & H. Ry. Co., 59 Conn. 364, 21 Atl. 1073; Erie Tel. & Tel. Co. v. Grimes, 82 Tex. 89, 17 S. W. 831; Fenneman v. Holden, 75 Md. 1, 22 Atl. 1049; O'Keefe v. Chicago, R. I. & P. R. Co., 32 Iowa, 467.

²⁷⁸ City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892.

SAME—VICARIOUS NEGLIGENCE.

247. The contributory negligence of a person other than the plaintiff is a proximate cause of harm, and operates as a bar to recovery, only when such person sustains a relation to the plaintiff which makes the latter liable to third persons for the negligence of such other person.

Where third persons are involved in the alleged contributory negligence, the plaintiff is not deprived of his remedy unless it be shown that such persons and himself are so identified by the law that their negligence may be imputed to him. Thus, as between master and servant, the same principle which makes the master liable for the negligence of his servant attributes to the master the contributory negligence of his servant in dealing with his master's business, and prevents recovery by the master for damage to which his servant's negligence contributed.²⁷⁹ On the other hand, an employé is not so identified with a co-employé that the latter's negligence is necessarily imputed to the employé.²⁸⁰

The doctrine of identification was applied in *Thorogood v. Bryan*²⁸¹ (1849) so as to hold that a passenger in an omnibus injured by a collision caused by the negligence of the driver was so identified with such driver as to prevent his recovery of damage because of the driver's contributory negligence. This doctrine, though subsequently followed,²⁸² was finally overruled in England. In *The Bernina*²⁸³ (1887) a collision occurred between two steamships, through the negligence of the master and crews of both vessels, and an engineer and passenger on board of one of the ships were drowned. Neither had anything to do with the negligent navigation. The representatives

²⁷⁹ *La Riviere v. Pemberton*, 46 Minn. 5, 7, 48 N. W. 406; *Schlenks v. Central Pass. Ry. Co.* (Ky.) 23 S. W. 589.

²⁸⁰ *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046.

²⁸¹ *Thorogood v. Bryan*, 8 C. B. 115. Et vide *Bridge v. Grand Junction Ry. Co.*, 3 Mees. & W. 244; *Cattlin v. Hills*, 8 C. B. 123.

²⁸² *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Exch. 47.

²⁸³ 13 App. Cas. 1, *Chase, Lead. Cas.* 233.

of the deceased persons were held entitled to recover against the owners of the colliding vessel on which they were not riding.

Lord Herschell said, in commenting on the three reasons assigned in *Thorogood v. Bryan*: "To say that it [the negligence of the driver] is a defense, because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which is the very point in issue. * * * What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? * * * And when it is attempted to apply this reasoning to passengers traveling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring. * * * If the master in such case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that, if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third persons. The learned judge would, I imagine, in that case, see a reason why a passenger in the omnibus stood in a better position than the master of the driver."

In rendering this decision, the English followed the lead of the American courts. The original doctrine had been previously rejected in *Chapman v. New Haven R. Co.*,²⁸⁴ and by the supreme court of the United States in *Little v. Hackett*.²⁸⁵ It was held in the latter case that a person who had hired a public hack, and given the driver directions as to the place to which he wished to be conveyed, but exercised no other control over the conduct of the driver, was not responsible for the latter's acts or negligence, nor prevented from recovering against a railroad company for injury suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and the driver. It is the almost universally accepted opinion that the negligence of a public or hired carriage is not to be imputed to a passenger who in the management of the conveyance exercised no control.²⁸⁶ If, how-

²⁸⁴ 19 N. Y. 341.

²⁸⁵ 116 U. S. 366, 6 Sup. Ct. 391 (1886).

²⁸⁶ *Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co.*, 41 Fed. 316; *Larkin v. Burlington, C. R. & N. Ry. Co.*, 85 Iowa, 492, 52 N. W. 480; *Bunting v. Hog-*

ever, the person being conveyed by such vehicle assumes control, and gives the driver directions, beyond merely naming his destination, he may become a dominus pro tempore, and make the driver his servant.²⁸⁷ But one who rides by invitation, with an apparently safe horse, and a driver whom he has no reason to believe incompetent, and exercises no control over either, is not chargeable with any negligence of the driver contributing to an accident.²⁸⁸ While there is some difference of opinion on the subject, arising in part from peculiarities of the statutory status of husband and wife,²⁸⁹ it is generally regarded that the negligence of either in driving is not necessarily to be attributed to the other.²⁹⁰ The original English doctrine of imputing the negligence of the person in charge of a vehicle or conveyance on which a person may be riding is generally rejected in America.²⁹¹

248. While the doctrine that the negligence of the custodian of a child of such tender years as to be non sui juris is imputed to it so far as to bar the cause of action for damages caused by the negligence of another is recognized, such doctrine would seem to be opposed alike to the weight of reasoning and of authority.

The doctrine of identification has been carried so far beyond the limits of *Thorogood v. Bryan* as to take away from a child non sui juris the right to recover damages suffered by it in consequence of

sett, 139 Pa. St. 363-375, 21 Atl. 31, 33, 34; *Becke v. Missouri Pac. Ry. Co.*, 102 Mo. 544, 13 S. W. 1053.

²⁸⁷ *McLaughlin v. Pryor*, 4 Man. & G. 48; *Holmes v. Mather*, L. R. 10 Exch. 261.

²⁸⁸ *Union Pac. R. Co. v. Lapsley*, 2 C. C. A. 149, 51 Fed. 174.

²⁸⁹ *Toledo, St. L. & K. C. R. Co. v. Crittenden*, 42 Ill. App. 469; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. And see *McCullough v. Railroad Co.*, 101 Mich. 234, 59 N. W. 618.

²⁹⁰ *Honey v. Chicago, B. & Q. Ry. Co.*, 59 Fed. 423; *Lake Shore & M. S. Ry. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476.

²⁹¹ *New York, L. E. & W. R. Co. v. Steimbrenner*, 47 N. J. Law, 161; *State v. Boston & M. R. Co.*, 80 Me. 430, 15 Atl. 36; *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N. W. 516; *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105; *St. Clair St. Ry. Co. v. Eadie*, 43 Ohio St. 91, 1 N. E.

another's negligence. In England, *Waite v. Northeastern Ry. Co.*²⁹² is supposed to be authority for the proposition that "they have succeeded in performing the dialectical feat of identifying a child with its grandmother." In this case a child of five years was taken to a railroad station by its grandmother. The ground of decision was that "the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge." The needful foundation of liability is wanting in this case, viz. that the defendant's negligence, and not something else, for which he is not answerable, and which he had no reason to anticipate, should be the proximate cause.²⁹³ No English decision goes to the length of depriving the child of redress on the ground that a third person's negligence allowed it to go alone.²⁹⁴ In America, however, the doctrine has been frequently recognized²⁹⁵ since its first enunciation²⁹⁶ in *Hartfield v. Roper & Newell*.²⁹⁷ Thus, where two children, aged respectively seven and fourteen years, undertook to cross a railroad track, the negligence of the attendant was not attributed to the older child, and her conduct was considered with respect to the capacity and discretion which at her age she was presumed to possess. "The wholly irresponsible infant has imputed to it without limit or qualification the conduct of the parent or other person standing in loco parentis, but this is not the rule of reason or of law in the case of the child which has arrived at an age where capacity and discretion are presumed."²⁹⁸

519; *Brickell v. New York Cent. & H. R. R. Co.*, 120 N. Y. 290, 24 N. E. 449; *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583.

²⁹² El., Bl. & El. 719.

²⁹³ Pol. Torts. 382.

²⁹⁴ Pol. Torts, 383, where it was said of *Mangan v. Atterton*, L. R. 1 Exch. 239: "We think it not law." But see *Child v. Hearn*, L. R. 9 Exch. 176.

²⁹⁵ *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Fitzgerald v. St. Paul, M. & M. R. Co.*, 29 Minn. 336, 13 N. W. 168; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Cauley v. Pittsburgh, C. & St. L. Ry. Co.*, 95 Pa. St. 398.

²⁹⁶ *Beasley, J.*, in *Newman v. Phillipsburg Horse-Car R. Co.*, 52 N. J. Law, 446, 19 Atl. 1102.

²⁹⁷ 21 Wend. (N. Y.) 615.

²⁹⁸ *Louisville, N. O. & T. Ry. Co. v. Hirsch*, 69 Miss. 126, 13 South. 244; *City*

On the other hand, however, it is more generally insisted that when negligence of the defendant is "proven in a suit by the child the parent's negligence is no defense, because it is regarded, not as the proximate, but as the remote, cause of injury. And the reason lies in the irresponsibility of the child, who, itself being incapable of negligence, cannot authorize it in another. It is not correct to say that the parent is the agent of the child, for the latter cannot appoint an agent. The law confides the care and custody of a child non sui juris to the parent, but, if this duty be not performed, the fault is the parent's, not the child's." To impute the fault of parents to children is to deny to the children the protection of the law.²⁹⁹ In fact, this "doctrine of imputability of the misfeasance of the keeper of the child to the child itself is deemed a pure interpolation into the law; * * * nor is it sustained by legal analogies."³⁰⁰ The infant "is incapable by himself of committing any act of negligence, and cannot authorize another to commit one. Therefore it seems unreasonable to require him or his estate to suffer loss because of the neglect or unauthorized act of his parents or others."³⁰¹

While, ordinarily, at the age of seven years, children are said to cease to be non sui juris, and to become sui juris, courts are inclined to regard the question as one of capacity in fact, and usually to require the jury to determine the measure of care required of the particular child under the circumstances of the case.³⁰²

of *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484. See *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 408; *Glassey v. Hestonville Ry. Co.*, 57 Pa. St. 172.

²⁹⁹ *Newman v. Phillipsburg Horse-Car R. Co.*, 52 N. J. Law, 446, 19 Atl. 1102; *Norfolk & W. R. Co. v. Groseclose's Adm'r*, 88 Va. 267-270, 18 S. E. 454; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657; *Wymore v. Mahaska Co.*, 78 Iowa, 396, 43 N. W. 264; *Battishill v. Humphreys*, 64 Mich. 494, 503, 31 N. W. 894; *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584; *Newman v. Phillipsburg Horse-Car R. Co.*, 52 N. J. Law, 446, 19 Atl. 1102. See, also, *Winters v. Kansas City Cable Ry. Co.*, 99 Mo. 509, 12 S. W. 652; *Chicago City R. Co. v. Wilcox* (Ill. Sup.) 24 N. E. 419; *Chicago City Ry. Co. v. Robinson*, 137 Ill. 9, 18 N. E. 772.

³⁰⁰ *Newman v. Phillipsburg Horse-Car R. Co.*, 52 N. J. Law, 446-449, 19 Atl. 1102.

³⁰¹ *Wymore v. Mahaska Co.*, 78 Iowa, 396, 399, 43 N. W. 264.

³⁰² *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29, 25 Atl. 650; *Chicago City Ry. Co. v. Wilcox* (Ill. Sup.) 24 N. E. 419; *Tobin v. Missouri Pac. Ry. Co.* (Mo. Sup.) 18 S. W. 906; *Bennett v. New York Cent. & H. R. R. Co.*, 133 N. Y.

249. Where the action is by the parent for the loss of service caused by an injury to the child, the contributory negligence of the plaintiff is a good defense.³⁰³

Parents of children of tender years must exercise care with reference to the tender years and discretion of the child, to the family exigencies, and to known dangers, or dangers that might be known by the exercise of ordinary diligence. The care of the custodian of children has reference alike to the tender age of the child and to any defect in its faculties.³⁰⁴ The parent is not necessarily negligent in allowing the child to go in company of another, personally capable of caring for it, near a concealed danger unknown to both.³⁰⁵ Domestic exigencies, as the sickness of the mother,³⁰⁶ or her exhausted condition,³⁰⁷ are proper matters for consideration. Thus, where a sick mother sends her boy across the street on a necessary errand, such act is not necessarily contributory negligence.³⁰⁸ The care that is to be exercised has reference to dangers customary in the given place,³⁰⁹ and to other dangers known, or which ought to be known. But the parent is bound to exercise care with reference to circumstances, and is not bound to anticipate carelessness on the part of others. And if the defendant, in the exercise of ordinary care, could have averted the parent's negligence, the infant or his representative may recover.³¹⁰ The question of the negli-

563, 30 N. E. 1149; *Brown v. Sherer*, 155 Mass. 83, 29 N. E. 50; *Lynch v. Metropolitan St. Ry. Co.*, 112 Mo. 420, 20 S. W. 642.

³⁰³ *Erie City Pass. Ry. Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 269; *Albertson v. Keokuk & D. M. Ry. Co.*, 48 Iowa, 292; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555; *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430.

³⁰⁴ *Platte & D. Canal & Milling Co. v. Dowell*, 17 Colo. 376, 30 Pac. 68; *Lynch v. Metropolitan St. Ry. Co.*, 112 Mo. 420, 20 S. W. 642.

³⁰⁵ *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619.

³⁰⁶ *Citizens' St. R. Co. of Indianapolis v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723; *Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107.

³⁰⁷ *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430.

³⁰⁸ *Id.*

³⁰⁹ Applied to jars customary in coupling cars. *De Mahy v. Morgan's L. & T. R. R. & S. S. Co.* 45 La. Ann. 1329, 14 South. 61.

³¹⁰ *Louisville, N. A. & C. R. Co. v. Shanks*. 132 Ind. 395, 31 N. E. 1111.

gence of parents is ordinarily for the jury; not for the court.³¹¹ If, however, the danger of the child could have been discovered by the defendant in time to avoid injury to it by the exercise of ordinary care, neither the parent's nor the child's right to recover is barred by this alleged contributory negligence in allowing it to be at large unattended.³¹²

³¹¹ *Creed v. Kendall*, 156 Mass. 291, 31 N. E. 6; *Baker v. Flint & P. M. Ry. Co.*, 91 Mich. 298, 51 N. W. 897; *Tobin v. Missouri Pac. Ry. Co.* (Mo. Sup.) 18 S. W. 996; *Huerzeler v. Central Cross Town R. Co.*, 139 N. Y. 490, 34 N. E. 1101; *Lederman v. Pennsylvania R. Co.*, 165 Pa. St. 118, 30 Atl. 725.

³¹² *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 14 S. E. 465; *Id.*, 37 W. Va. 421, 16 S. E. 628; *Baltimore C. P. Ry. Co. v. McDonnell*, 43 Md. 534; *Huerzeler v. Central Cross Town R. Co.*, 1 Misc. Rep. 136, 20 N. Y. Supp. 676.

CHAPTER XIII.**MASTER AND SERVANT.**

- 250. Master's Duties to Servant.
- 251. Master not an Insurer.
- 252-253. Assumption of Risk by Servant.
- 254. Ordinary Risks.
- 255. Extraordinary Risks
- 256. Exceptions.
- 257. Risk of Fellow Servants.
- 258. Common Employment.
- 259-260. Vice Principals.
- 261-262. Concurrent Negligence of Master.
- 263. Statutory Changes.

MASTER'S DUTIES TO SERVANT.

- 250. A master owes to his servant certain inalienable, nonassignable duties peculiar to the relationship, based in general upon the duty not to expose him to unnecessary or unreasonable risks. The servant has a right to assume that his employer has performed these duties. They consist in the exercise of reasonable care with reference to—**
- (a) Providing and maintaining suitable appliances, machinery, and places to work.**
 - (b) Providing proper fellow servants in sufficient number.**
 - (c) Making and promulgating rules for the regulation of servants and giving warning and instruction especially to youthful and inexperienced employes, with reference to danger, whether—**
 - (1) Naturally incident to the employment, or**
 - (2) Arising from causes extraneous to it.**
 - (d) Inspecting appliances, machinery, and places to work, supervising fellow servants, and securing the observance of rules.**

Duties are Peculiar to the Relationship.

The liability of the master to his servant is governed by the ordinary principles of tort. The burden is on the servant to show a breach of duty by the master. The law presumes that the master has done his duty. These peculiar duties apply only when the relation of the master and servant exist. Therefore, ordinarily a mere volunteer assisting a servant cannot recover. If he is injured by the negligence of the servant, he can have no recourse against the master.¹ The master owes peculiar duties to the servant only when the servant is in his employ and doing his work. At other times he owes him the same duty he owes to a third person in a corresponding situation. Whether the servant when injured was acting within the scope of his employment and on the line of his duty, or as a mere stranger, is ordinarily a question of fact for the jury.²

Providing Appliances.

The employer is bound, at least, to exercise reasonable care to furnish his employes with appliances and machinery suitable to carry on the employment, having reference to its character, the state of the art which it involves, and statutory requirements. Thus, a railroad company must exercise care to furnish a reasonably, but not absolutely, safe roadbed and tracks,³ switches,⁴ hand cars,⁵ cars,⁶ engines,⁷ bridges,⁸ and other instrumentalities. Failure to exercise care so to equip its road and roadbed is negligence.

But knowledge by a master of the defective condition of machin-

¹ Flower v. Pennsylvania R. Co., 69 Pa. St. 210; McIntire Ry. Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333.

² Mullin v. Northern Mill Co., 53 Minn. 29, 55 N. W. 1115; Walbert v. Trexler, 156 Pa. St. 112, 27 Atl. 65.

³ Burdict v. Missouri Pac. Ry. Co., 123 Mo. 221, 27 S. W. 453; Ford v. Chicago, R. I. & P. Ry., 91 Iowa, 179, 59 N. W. 5 (cattle guard); Ragon v. Toledo, A. A. & N. M. Ry. Co., 97 Mich. 265, 56 N. W. 612 (ballast); Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166 (sharp curve).

⁴ Birmingham Railway & Electric Co. v. Allen, 99 Ala. 359, 13 South. 8.

⁵ Northern Pac. R. Co. v. Charless, 2 C. C. A. 380, 51 Fed. 562.

⁶ Le Clair v. First Division St. Paul & P. R. Co., 20 Minn. 9 (Gil. 1).

⁷ Texas & P. Ry. Co. v. Patton, 9 C. C. A. 487, 61 Fed. 250.

⁸ Conlon v. Oregon S. L. & U. N. Ry. Co., 23 Or. 499, 32 Pac. 397; Cleveland, C., C. & St. L. R. Co. v. Walter, 147 Ill. 60, 35 N. E. 529.

ery does not make him liable for injuries resulting therefrom to one of his servants, unless he had a reasonable opportunity, after acquiring such knowledge, to remedy the defect,⁹ and no action will lie against a master for damages caused by a defective tool where the employé injured could have obtained a proper one at any or within a reasonable time.¹⁰

The rule applies alike to animate and inanimate instrumentalities. The employer may be liable for negligence in furnishing unfit or dangerous horses for his servant's use.¹¹ The fact that the employer may be using the appliances of a third person does not exempt him from the performance of this duty. Therefore, whoever uses a car may be liable for negligence if its defects result in damage, although the car may have belonged to some one else.¹²

The employer, however, is not bound to provide the best, safest, or newest instruments, although he must discontinue insecure or unsafe methods.¹³ On the one hand, he is not required to invest in experiments. The utility of the device which it is insisted he should have used must have been demonstrated before the law will require him to use it.¹⁴ On the other hand, the employer must exercise due care in introducing "untried novelties."¹⁵

The master is bound to comply with statutory requirements designed for the safety of his employés. In many cases the statutes are declaratory of common-law requirements for the protection of servants. Thus, where, in the absence of statute, an unprotected frog caused the accident, it was determined that the finding of negligence was sustained by evidence that devices (e. g. wooden blocks)

⁹ *Seaboard Manuf'g Co. v. Woodson*, 98 Ala. 378, 11 South. 733.

¹⁰ *Allen v. G. W. & F. Smith Iron Co.*, 160 Mass. 557, 36 N. E. 581.

¹¹ *Hammond Co. v. Johnson*, 38 Neb. 244, 56 N. W. 967. Cf. *Craven v. Smith*, 89 Wis. 119, 61 N. W. 317.

¹² *Louisville & N. R. Co. v. Williams*, 95 Ky. 199, 24 S. W. 1; *Spaulding v. W. N. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134. But see *Ballou v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 257, 11 N. W. 559; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791.

¹³ *Washington & G. R. Co. v. McDade*, 135 U. S. 554-570, 10 Sup. Ct. 1044; *Harley v. Buffalo Car Manuf'g Co.*, 142 N. Y. 31, 36 N. E. 813; *La Pierre v. Chicago & G. T. Ry. Co.*, 99 Mich. 212, 58 N. W. 60.

¹⁴ *Lorimer v. St. Paul City Ry. Co.*, 48 Minn. 391, 51 N. W. 125.

¹⁵ *Marshall v. Widdicomb Furniture Co.*, 67 Mich. 167, 34 N. W. 541.

practicable, reasonable, adequate, and inexpensive, were known to the railroad company for protection against such danger. It was held bound to use devices for the protection of its employes known to it or ascertainable by the use of proper diligence, intelligence, and care.¹⁶ This common-law duty of blocking frogs is commonly subject to statutory enactment.¹⁷

Providing Safe Place for Work.

The general duty of the master to the servant requires him to exercise reasonable care in seeing that the place where the servant works is safe for the purpose:¹⁸ and this duty extends not only to such unnecessary and unreasonable risks as are in fact known to the employer, but also to such as he ought to have known, in the exercise of proper diligence. The servant has a right to rely upon the performance of the duty of his master to protect him against the obvious hazard of the place of his work. Thus, where a car repairer is engaged under a jacked-up car, and an engine moves up the track and strikes the car, whereby the servant is injured, the master is liable, although the act of the engineer was in violation of rules.¹⁹ But a master is not bound to provide a safe place, where the work on which the servant is engaged is such as to render the place where it is done temporarily insecure.²⁰

The care that is to be exercised has reference to the danger to which the customary use of the place or appliances is likely to expose the servant. The master is not responsible where the place or appliances are put to an unusual test,²¹ or to a use not anticipated.²²

Providing Fellow Servants.

The same degree of care which an employer should take in providing and maintaining his machinery, place, and appliances must be observed in selecting and retaining his employes. The employer

¹⁶ *Sherman v. Chicago, M. & St. P. Ry. Co.*, 34 Minn. 259, 25 N. W. 593.

¹⁷ *Holum v. Chicago, M. & St. P. Ry. Co.*, 80 Wis. 299, 50 N. W. 99.

¹⁸ *Fosburg v. Phillips Fuel Co.* (Iowa) 61 N. W. 400.

¹⁹ *St. Louis, A. & T. Ry. Co. v. Triplett*, 54 Ark. 289, 15 S. W. 831, and 16 S. W. 266; *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. 1108.

²⁰ *Gulf, C. & S. F. Ry. Co. v. Jackson*, 12 C. C. A. 507, 65 Fed. 48.

²¹ *Preston v. Chicago & W. M. Ry. Co.*, 98 Mich. 128, 57 N. W. 31.

²² *Richmond & D. R. Co. v. Dickey*, 90 Ga. 491, 16 S. E. 212.

is not justified in subjecting his servant to injury from incompetent,²³ unskillful,²⁴ drunken,²⁵ habitually negligent,²⁶ or otherwise unfit fellow servants.²⁷ He is liable if he knew, or, in the exercise of reasonable diligence, could have known, of such unfitness, incompetency, intemperance, or insufficiency.²⁸ He has the right to rely upon the presumption that the servant will continue careful and skillful, and, when notified that he has become careless, he is ordinarily not bound to discharge him without an investigation into the charge, unless notice is accompanied by such evidence as leaves no reasonable doubt of the truth of the charge.²⁹ The employer may be negligent in supplying an insufficient force of workmen.³⁰

Rules.

The employer is bound to make and promulgate general rules for the conduct of employes exposed to danger whenever the nature of the work demands it.³¹ If he fails to do so, he will be liable for damage consequent upon such negligence. If he had made them, and they are violated, he may still be responsible.³² The servant has a right to rely upon the obedience to such rules on the part of other employes. Thus, workmen engaged in track repairing are not bound to keep out of the way of moving trains, unless the required signals are given. If the trainmen give the proper signals, they may then go ahead; but, if they discover that their warning was

²³ *Galveston, H. & S. A. Ry. Co. v. Arispe*, 81 Tex. 517, 17 S. W. 47; *McGuerty v. Hale*, 161 Mass. 51, 36 N. E. 682; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241.

²⁴ *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883.

²⁵ *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860.

²⁶ *Hughes v. Baltimore & O. R. Co.*, 164 Pa. St. 178, 30 Atl. 383; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241.

²⁷ *Louisville & N. R. Co. v. Davis*, 91 Ala. 487, 8 South. 552.

²⁸ *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590.

²⁹ *Chapman v. Erie R. Co.*, 55 N. Y. 579.

³⁰ *Harvey v. New York Cent. & H. R. R. Co.*, 57 Hun, 589, 10 N. Y. Supp. 645; *Southern Pac. Co. v. Lafferty*, 6 C. C. A. 474, 57 Fed. 536.

³¹ *Lake Shore & M. S. Ry. Co. v. Lavalley*, 36 Ohio St. 221; *Pittsburg, F. W. & C. Ry. Co. v. Powers*, 74 Ill. 341; *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57.

³² *Northern Pac. R. Co. v. Nickels*, 1 C. C. A. 625, 50 Fed. 718.

unheeded, they must try to stop the train. If the rules of the company do not require such signals, this is neglect of duty.³³ It is the duty of the servant to regulate his conduct with due reference to the master's rules, which he knows, or ought to know, provided such rules are reasonable, and if he fails to do so he cannot recover.³⁴ But a master cannot escape liability for negligence by prescribing rules, any more than he can by expressly contracting against liability for it. Accordingly, a rule that employes must look after, and be responsible for, their own safety, is no defense.³⁵ But, while the master may not contract against negligence on his part, he may secure additional care on the part of his employé by such a rule.³⁶

Warning and Instructing as to Incidental Dangers.

If the servant knows all the master could teach him, he is, under ordinary circumstances, entitled to no warning or instruction from the master.³⁷ The right of the servant to assume that the employer has performed his duty includes the right to rely on the principle that when he is placed in a situation of danger requiring engrossing attention the master will not without warning subject him to other perils unknown to him.³⁸ And in general the master should give warning as to perils not obvious, or known to him only, whether he actually knew of them, or should have known of them in the exercise of reasonable care.³⁹ By way of illustration, a master has a right to expect a minor to keep his hands out of a revolving machine, just as he would keep away from a locomotive in motion.⁴⁰

³³ Erickson v. St. Paul & D. R. Co., 41 Minn. 500, 43 N. W. 332.

³⁴ Post, p. 515, "Assumption of Risk—Rules."

³⁵ Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360.

³⁶ Bennett v. Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408. And see Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791.

³⁷ Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286.

³⁸ Michael v. Roanoke Mach. Works, 90 Va. 492, 19 S. E. 261.

³⁹ Helmke v. Stetler, 69 Hun, 107, 23 N. Y. Supp. 392; Griffin v. Ohio & M. Ry. Co., 124 Ind. 326, 24 N. E. 888; Lynch v. Allyn, 160 Mass. 248, 35 N. E. 550; Bohn Manuf'g Co. v. Erickson, 5 C. C. A. 341, 55 Fed. 943.

⁴⁰ Berger v. St. Paul, M. & M. R. Co., 39 Minn. 78, 38 N. W. 814; Mackin v. Alaska Refrigerator Co., 100 Mich. 276, 58 N. W. 999; McCue v. National Starch Manuf'g Co., 142 N. Y. 106, 36 N. E. 809; Chicago Anderson Pressed-Brick Co. v. Reinneiger, 140 Ill. 334, 29 N. E. 1106.

If, however, the danger be concealed, the minor may be allowed to recover.⁴¹ Inexperienced servants, on the same principle, are entitled to instruction whenever the dangers or means of avoiding danger are not obvious.⁴² The duty as to warning does not apply where the servant received the needed information from persons other than the employer, or where such information may be attributed to him as the ordinary danger of the service.⁴³

Warning and Instructing as to Extraneous Dangers.

It is to be remembered, however, that the master's liability is broader than for mere negligence in its popular sense. The liability of the master in cases of negligence usually arises from his failure to protect against, or to advise as to the existence of, dangers incident to the employment. He is bound, however, to protect his employé from danger known to him to arise from the felonious or tortious designs of third persons acting in hostility to the employer.⁴⁴

Inspection, Supervision, and Enforcement.

The general duty of the master includes the duty and involves the exercise of care in maintaining⁴⁵ his appliances, machinery, and place of work in proper condition and safety, and in making tests and examinations at proper intervals.⁴⁶ This duty is a continuing one, and daily use of appliances and place in safety is not sufficient to show the performance of the duty of inspection.⁴⁷ The duty of inspection is affirmative, and must be continuously ful-

⁴¹ Haynes v. Erk, 6 Ind. App. 332, 23 N. E. 637; Armstrong v. Forg, 162 Mass. 544, 39 N. E. 190.

⁴² Atlas Engine Works v. Randall, 100 Ind. 293.

⁴³ Consolidated Coal Co. v. Scheller, 42 Ill. App. 619; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654. But the master does not discharge his duty of warning of danger by notifying a fellow servant who fails to communicate to plaintiff. Pullman Palace-Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285.

⁴⁴ Baxter v. Roberts, 44 Cal. 187. And, generally, see Strahlendorf v. Rosenthal, 30 Wis. 674.

⁴⁵ Galveston, H. & S. A. R. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066.

⁴⁶ Fuller v. Jewett, 80 N. Y. 46; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590.

⁴⁷ Tangney v. J. B. Wilson & Co., 87 Mich. 453, 49 N. W. 666; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574; Toy v. United States Cartridge Co., 159 Mass. 313, 34 N. E. 461.

filled, and positively performed.⁴⁸ Accordingly, to render the master liable for an injury to a servant, caused by defective machinery, appliances, and place, it is not necessary that the master have actual knowledge of the defect or danger. It is sufficient to show that he could have discovered the defect or danger by the exercise of reasonable care and diligence in the performance of his duties.⁴⁹ Actual knowledge of defect or danger is, of course, sufficient to attach liability.⁵⁰ The master must supervise his servants and see that they do their duty.⁵¹ Thus he must follow them in making needed repairs.⁵² The master must also see that his rules are enforced.

SAME—MASTER NOT AN INSURER.

251. A master is liable only for failure to exercise reasonable care in the performance of his duties to his servant. He is not an insurer.

The master is not an insurer.⁵³ He is liable for failure to exercise care proportionate to the danger. This care is not controlled by the custom or current usage and practice among other employers in the same line of business,⁵⁴ but has reference to the care of a prudent man in avoiding natural perils, and in using known devices for avoiding them.⁵⁵ The employer is, however, required to know what appliances are suitable, and in common and ordinary use, for the purpose.⁵⁶ The master is not liable for latent defects.⁵⁷

⁴⁸ *Buzzell v. Manufacturing Co.*, 48 Me. 113.

⁴⁹ *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

⁵⁰ *Union Stock Yards Co. of Omaha v. Larson*, 38 Neb. 492, 58 N. W. 1079.

⁵¹ But see *Parker v. New York & N. E. R. Co. (R. I.)* 30 Atl. 849; *Connors v. Durite Manuf'g Co.*, 156 Mass. 163, 30 N. E. 559.

⁵² *Sweat v. Boston & A. R. Co.*, 156 Mass. 284, 31 N. E. 296, collecting cases.

⁵³ *Camp Point Manuf'g Co. v. Ballou*, 71 Ill. 417; *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55; *Burke v. Witherbee*, 98 N. Y. 562; *Chicago & A. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117.

⁵⁴ *McCormick Harvesting Mach. Co. v. Burandt*, 136 Ill. 170, 26 N. E. 588.

⁵⁵ *Koons v. Railroad Co.*, 65 Mo. 592.

⁵⁶ *Bannon v. Lutz*, 158 Pa. St. 166, 27 Atl. 890.

⁵⁷ *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. 989; *Sweat v. Boston & A. R. Co.*, 156 Mass. 284, 31 N. E. 296.

Thus, he cannot be held responsible for a hidden defect in switches.⁵⁸ But, on the other hand, for example, if a hook holding a very heavy weight has a crack plainly in sight, the master is negligent in allowing it to be used.⁵⁹

The duty of the master is sometimes stated with reference to the results of care, i. e. that he is bound to furnish instrumentalities, place, and servants reasonably safe as a matter of fact. On the other hand, however, it is insisted by the later cases that this is inaccurate and objectionable, especially because it is likely to confuse his duty with insurance, and that the rule should have reference, not to the result, but to the exercise of care.⁶⁰ The duty of the master, according to this line of authorities, is performed if he uses due care and diligence in the performance of his duty.⁶¹ Many well-considered cases retain the earlier phraseology, of requiring the master to furnish reasonably safe place, instrumentality, and the like.⁶²

However, with respect to the employment of a fellow servant, the law seems to be quite definitely settled that the duty of an employer is discharged by the exercise of reasonable care in the selection of his servants. Thus, if a railway company employ a competent physician to take care of an injured employé, it is not liable for the death of the employé through a mistake of the physician.⁶³

⁵⁸ Ladd v. New Bedford Ry. Co., 119 Mass. 412.

⁵⁹ Spicer v. South Boston Iron Co., 138 Mass. 426.

⁶⁰ Chicago, R. I. & P. R. Co. v. Linney, 7 C. C. A. 656, 59 Fed. 45; Illinois River Paper Co. v. Albert, 49 Ill. App. 363; Dewey v. Detroit, G. H. & M. Ry. Co., 97 Mich. 329, 52 N. W. 942, and 56 N. W. 756.

⁶¹ St. Louis S. W. R. Co. v. Jagerman, 59 Ark. 98, 28 S. W. 591; Park Hotel Co. v. Lockhart (Ark.) 28 S. W. 23.

⁶² Houston v. Brush (1894) 66 Vt. 331, 29 Atl. 380.

⁶³ Atchison, T. & S. F. R. Co. v. Zeller, 54 Kan. 340, 38 Pac. 282; Louisville & N. R. Co. v. Kelly, 11 C. C. A. 280, 63 Fed. 407.

ASSUMPTION OF RISK BY SERVANT.

252. On entering service, a servant is said to impliedly contract that he possesses the ordinary skill and experience of those engaged in the occupation he undertakes, that he will exercise ordinary care to protect himself while engaged in that occupation, and that he will assume the risks of his occupation.

253. The risks which the servant assumes may arise—

(a) From circumstances exclusive of the risk of fellow servants, and may be either—

(1) The ordinary risks of the employment;

(2) The extraordinary risks of the employment.

(b) From the negligence of fellow servants.

SAME—ORDINARY RISKS.

254. Excluding the negligence of fellow servants, a servant assumes the ordinary risks of his employment, with the instrumentalities, in the place, and under the rules of the work for which he is engaged, which are reasonably necessary and incidental to it, and which are apparent to ordinary observation: provided—

(a) He knew and appreciated, or should have known and appreciated, the risks and dangers, in the prudent exercise of his senses and common sense, regard being had to his age, capacity, and experience;

(b) The master has exercised reasonable care to prevent them.

Instrumentalities.

The servant assumes risks ordinarily incidental to the instrumentalities of his employment. Thus, cars carrying rails, in course of travel, disarranged such rails so as to make coupling cars impossible in the ordinary way. The cars stopped at a station long enough to enable the rails to be properly placed. An accident occurred,

partly on account of irregular position of rails. It was held that the disarrangement was a natural result of the transportation; that the danger was obvious, and the risk assumed.⁶⁴ A brakeman does not assume the risk of injury from a defective track or roadbed.⁶⁵ By way of contrast, in a cold climate, railroad employes assume the risks incident to the accumulation of snow and ice on the tracks.⁶⁶ They assume manifest risks of instrumentalities, although not necessarily incidental to the service. Thus, if an employé voluntarily and without specific command as to time and manner uses a ladder for adjusting electric wires, and that ladder is known to both employer and employé to be obviously defective, they both stand on common ground. The employé elects to take the risk, and cannot recover for resulting damage.⁶⁷ But where a common laborer was set to work near the fumes of nitric acid, as to the injurious effects of which on the human system under the circumstances experts disagree, the danger was not so apparent that he could be held to have voluntarily assumed it.⁶⁸

Place.

The risks assumed include the obvious dangers of the place at which the servant is engaged. Thus an employé who, while engaged in removing a wrecked train, goes upon an obviously new and temporary bridge, defects of which are visible, assumes the risks arising from such defects.⁶⁹ On the other hand, however, an engineer working on a mountain division does not assume the risks of faulty construction and maintenance of the road, whereby sand

⁶⁴ Doyle v. St. Paul, M. & M. Ry. Co., 42 Minn. 79, 43 N. W. 787. Cf. Northern Pac. R. Co. v. Everett, 152 U. S. 107, 14 Sup. Ct. 474. But see Dewey v. Detroit, G. H. & M. R. Co., 97 Mich. 329, 56 N. W. 756; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Johnson v. Hovey, 98 Mich. 343, 57 N. W. 17.

⁶⁵ Gulf, C. & S. F. Ry. Co. v. Hohl (Tex. Civ. App.) 29 S. W. 1131.

⁶⁶ Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546.

⁶⁷ Jenney Electric Light & Power Co. v. Murphy, 115 Ind. 566, 18 N. E. 30. See, also, Steinhäuser v. Spraul, 127 Mo. 541, 30 S. W. 102; Powers v. Railroad Co., 98 N. Y. 274.

⁶⁸ Wagner v. H. W. Jayne Chemical Co., 147 Pa. St. 475, 23 Atl. 772.

⁶⁹ McGrath v. Texas & P. Ry. Co., 9 C. C. A. 133, 60 Fed. 555; Odell v. Railroad Co., 120 N. Y. 325, 24 N. E. 478; Ragon v. Railway Co., 97 Mich. 265, 56 N. W. 612 (visible hole in roadbed); McNeill v. New York, L. E. & W. R. Co., 142 N. Y. 631, 37 N. E. 566.

and gravel accumulate on the track, and cause derailment of engine, and his injury.⁷⁰

Rules.

If an employé has assented to certain reasonable rules of his master, his conduct must conform to them, and if his damage complained of is the consequence of their violation he cannot recover.⁷¹ Thus, if the rules of a railroad company forbid coupling without the use of a stick, and a servant is injured while undertaking to make a coupling without a stick, he cannot recover.⁷² But an employé is not bound by such a rule unless it is actually or constructively brought to his attention.⁷³ However, if, with the actual or constructive acquiescence of the master, the rule is habitually ignored, the master may be liable.⁷⁴ On the same principle, a brakeman may assume the risk occasioned by the running of a train at a rate of speed greater than is allowed by an ordinance, if such violation is customary.⁷⁵

SAME—EXTRAORDINARY RISKS.

- 255. The servant cannot recover from his employer for damages consequent upon extraordinary risks which he has knowingly assumed.**

A servant cannot recover against his master for personal injury resulting from manifestly defective and dangerous appliances⁷⁶ or places,⁷⁷ especially when warned. This is sometimes put on the

⁷⁰ Union Pac. Ry. Co. v. O'Brien, 1 C. C. A. 354, 49 Fed. 538; St. Louis, A. & T. H. R. Co. v. Holman, 155 Ill. 21, 39 N. E. 573.

⁷¹ Mason v. Richmond & D. R. Co., 114 N. C. 718, 19 S. E. 362.

⁷² Russell v. Richmond & D. R. Co., 47 Fed. 204; Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Ford v. Chicago, R. I. & P. Ry. Co. (Iowa) 59 N. W. 5.

⁷³ Fay v. Minneapolis & St. L. Ry. Co., 30 Minn. 231, 15 N. W. 241.

⁷⁴ Northern Pac. R. Co. v. Nickels, 1 C. C. A. 625, 50 Fed. 718.

⁷⁵ Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079.

⁷⁶ Texas & P. Ry. Co. v. Rogers, 6 C. C. A. 403, 57 Fed. 378; Clark v. St. Paul & S. C. R. Co., 28 Minn. 128, 9 N. W. 581; Louisville, E. & St. L. C. R. Co. v. Allen, 47 Ill. App. 465; Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 36 N. E. 789; Wheeler v. Berry, 95 Mich. 250, 54 N. W. 876.

⁷⁷ Smith v. Winona & St. P. R. Co., 42 Minn. 87, 43 N. W. 968.

ground of waiver and sometimes on the ground of contributory negligence.⁷⁸ But he does not assume such extraordinary risks unless he has knowledge, actual or constructive, of the danger.⁷⁹ If, however, he voluntarily, without any expressed or implied direction from his employer, undertakes hazardous work, he cannot complain.⁸⁰ So a trackman, whose duty it is to watch for and protect himself against wild trains, assumes the danger of a collision between a wild train and a hand car which he is pushing.⁸¹

SAME—EXCEPTIONS.

256. But the principles as to assumption of risk do not apply—

- (a) Where the servant may know of the defect or danger, but does not necessarily or reasonably know of or appreciate the consequent risk.
- (b) Where the injured servant was, without proper notice of increased risk, put to a service outside of and more dangerous than the employment for which he was engaged. This exception has been particularly applied to the employment of persons of immature age.
- (c) Where the master has clearly promised the servant to remove the peril, unless the damage be so immediate and imminent that an ordinarily prudent man would not continue in the service; and not then
- (d) Where the duty to continue in the dangerous service is required or justified by an emergency approved by law.
- (e) Where the assumption of risk by the servant cannot be held to be voluntary.

⁷⁸ *Greene v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 249, 17 N. W. 378.

⁷⁹ *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890.

⁸⁰ *Goff v. Chippewa River & M. Ry. Co.*, 86 Wis. 237, 56 N. W. 465.

⁸¹ *Sullivan v. Fitchburg R. Co.*, 161 Mass. 125, 36 N. E. 751.

Appreciation of Risk.

Knowledge of defect or imperfection is not necessarily knowledge of risk. The servant is not bound to inspect the risk as closely as his master. He has a right to presume that his master will do his duty. He does not necessarily assume the risk incident to the use of unsafe instrumentalities because he knows its character and condition. It is necessary also that he understands, or by the exercise of common observation ought to have known, the risk to which he was exposed by its use. Before he can be held to have assumed the risk, it must appear that he knew all the facts material to the risk, and appreciated and understood it.⁸² Knowledge of imperfection or danger, as well as appreciation of risk, is affected by the experience and age of the parties.⁸³ Appreciation and assumption of risk are ordinarily questions of fact for the jury,⁸⁴ and suggestion of danger by appearance of machinery is for the jury, and not for experts.⁸⁵

Assumption of Risk as Affected by Original Services.

Most of the cases as to assumption of risk refer to risks assumed on entering the service. The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact, to be independently decided, whether a servant who works on,

⁸² Steen v. St. Paul & D. R. Co., 37 Minn. 310, 34 N. W. 113; Consolidated Coal Co. of St. Louis v. Haenni, 146 Ill. 614, 35 N. E. 162; Russell v. Minneapolis & St. L. R. Co., 32 Minn. 230, 20 N. W. 147. See, also, Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298; Mellor v. Merchants' Manuf'g Co., 150 Mass. 362, 23 N. E. 100; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573; Kaare v. Troy Steel & Iron Co., 139 N. Y. 369, 34 N. E. 901.

⁸³ Alcorn v. Chicago & A. Ry. Co., 108 Mo. 81, 18 S. W. 188. Cf. Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692 (where it was held that a minor does not assume a risk), with Ogley v. Miles, 139 N. Y. 458, 34 N. E. 1059 (where it was held that he did).

⁸⁴ Ferren v. Old Colony R. Co., 143 Mass. 197, 9 N. E. 608; Chopin v. Badger Paper Co., 83 Wis. 192, 53 N. W. 452; Colf v. Chicago, St. P., M. & O. Ry. Co., 87 Wis. 273, 58 N. W. 408; Hungerford v. Chicago, M. & St. P. Ry. Co., 41 Minn. 444, 43 N. W. 324. But the court sometimes takes the case from the jury. Ogley v. Miles, 139 N. Y. 458, 34 N. E. 1059.

⁸⁵ Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873.

appreciating the risk, assumes it voluntarily, or endures it because he feels constrained so to do.⁸⁶ "If a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes such duties knowing their dangerous character, although unwillingly and from fear of losing his employment, and he is injured, he cannot maintain an action for the injury."⁸⁷ So a servant who voluntarily, and without direction from the master, goes into hazardous work outside of his contract, assumes the consequent risk.⁸⁸

The implied assumption of risk does not apply to work outside the scope of original employment where there are dangers peculiar to it, and unfamiliar to the servant.⁸⁹ And it is a universally recognized principle that where a youthful and inexperienced employé is, without his parents' consent, put to work more difficult and more dangerous than that for which he is employed, the risks are not assumed.⁹⁰

Promise to Remedy.

If the servant, on discovering the danger, complain thereof to the master, and the master directs the servant to continue his employment notwithstanding, and promises to remedy the danger, the risk is not assumed.⁹¹ "If the servant [of a railroad company] notes the defects in machinery, gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a

⁸⁶ Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464.

⁸⁷ Leary v. Boston & A. R. Co., 139 Mass. 580, 2 N. E. 115; Hogan v. Northern Pac. R. Co., 53 Fed. 519.

⁸⁸ Pittsburgh, C. & St. L. Ry. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Prentiss v. Kent Furniture Manuf'g Co., 63 Mich. 478-482, 30 N. W. 109. But see O'Maley v. South Boston Gaslight Co., 158 Mass. 136, 32 N. E. 1119.

⁸⁹ Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106; Consolidated Coal Co. v. Haenni, 48 Ill. App. 115, affirmed 146 Ill. 614, 35 N. E. 162; Lalor v. Chicago, B. & Q. R. Co., 52 Ill. 401. However, if the servant is instructed as to and familiar with the dangers and use of the outside work (as of a saw), he assumes the risk. Wheeler v. Berry, 95 Mich. 250, 54 N. W. 876.

⁹⁰ Union Pac. R. Co. v. Fort, 17 Wall, 553; Id., 2 Dill. 259, Fed. Cas. No. 4,952; Northern Pac. Coal Co. v. Richmond, 7 C. C. A. 485, 58 Fed. 756.

⁹¹ Hough v. Railway Co., 100 U. S. 213; Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 248, 17 N. W. 378.

reasonable time, does not necessarily, as a matter of law, make him guilty of contributory negligence. It is a question for the jury whether in relying upon such promise, and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof in such a case is upon the company to show contributory negligence.”⁹³

If the instrumentalities or place are so defective and dangerous, imminently and immediately, that a man of ordinary prudence would have refused to continue work, the servant is negligent.⁹⁴

Justification in Law.

But the servant is not bound to give up his employment merely because his master directs him to undertake extraordinarily hazardous work. He has a right to have his fears allayed by judgment of his master, involved in command. Thus, if a laborer employed to unload cars is directed by his master to couple cars, and, while so doing, has his hands crushed, he can recover.⁹⁵ This is especially true when the unusual danger is not apparent to a mind like the servant's.⁹⁶ A fortiori, in many cases the public interest is a good reason for the obedience on the part of servants to the direction of the employer to undertake unusual risk.⁹⁷

Assumption not Properly Voluntary.

Where the act done is not voluntary, the risk is not assumed. If a seaman is by statute bound to obey orders, he does not assume the risks incident to operating an uncovered winch, in compliance with the command of his superior officer.⁹⁸ So, a convict working under a contract does not assume the risks of a dangerous place, even if those risks be known to him, because his movements are controlled by a guard.⁹⁹ On the same principle, if the servant is, by the

⁹³ Hough v. Railroad Co., 100 U. S. 213.

⁹⁴ Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 248, 17 N. W. 378; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231.

⁹⁵ Lalor v. Chicago, B. & Q. Ry. Co., 52 Ill. 401.

⁹⁶ Colorado M. Ry. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701.

⁹⁷ Campbell v. Railroad Co., 45 Iowa, 76; Moore v. Wabash, St. L. & P. R. Co., 85 Mo. 588; Fordyce v. Edwards, 60 Ark. 438, 30 S. W. 758; Strong v. Iowa Cent. Ry. Co. (Iowa) 62 N. W. 799.

⁹⁸ Eldridge v. Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66.

⁹⁹ Chattahoochee Brick Co. v. Braswell, 92 Ga. 631, 18 S. E. 1015.

wrong of the master, placed in a position of imminent peril, he is not guilty of contributory negligence if, in his endeavor to escape dangers for which the master provided no escape, he takes the means to preserve his life which result in his death.⁹⁹

SAME—RISK OF FELLOW SERVANTS.

257. "A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow servant when he is acting in the discharge of his duty as servant of him who is the common master to both,"¹⁰⁰ unless,

- (a) The master's negligence in the employment of such fellow servant, or
- (b) His wrong in some other respect, was the juridical cause of the injury.

The rule as to fellow servants is of modern origin, and is judge-made law. The earliest case on the point is said to be *Priestley v. Fowler* (1837).¹⁰¹ The rule was first indisputably enunciated in 1841, in a South Carolina case (*Murray v. Railroad Co.*).¹⁰² The opinion, however, which really established the doctrine, was that of Chief Justice Shaw in *Farwell v. Boston & W. R. Corp.*, in 1842.¹⁰³ In 1858 the Scottish courts adopted the rule, and in the case of *Bartonshill Coal Co. v. Reid*¹⁰⁴ reported in full Chief Justice Shaw's masterly judgment.

Reason of the Rule.

The doctrine of the assumption by the servant of the risk of the negligence of his fellow servant is justified on several grounds.

Thus, it is urged that it is expedient to throw the risk on those

⁹⁹ *Louisville & N. R. Co. v. Shively's Adm'r* (Ky.) 18 S. W. 944.

¹⁰⁰ *Tunney v. Midland Ry. Co.* (1866) L. R. 1 C. P. 291-296.

¹⁰¹ 3 Mees. & W. 1. In 1850 (*Hutchinson v. Railway Co.*, 5 Exch. 343) the English courts adopted the rule fully and completely.

¹⁰² 1 McMul. (S. C.) 385.

¹⁰³ 4 Metc. (Mass.) 49.

¹⁰⁴ 3 Macq. 266.

who can best guard against it,¹⁰⁵ and that its moral effect tends to secure the exercise of a greater degree of care and caution by employes.¹⁰⁶

It is more generally, and in addition, assigned as a reason, that the servant enters into a contract with reference to, and impliedly assumes the risks resulting from, the negligence of his fellow servants.¹⁰⁷

Who are Fellow Servants.

In order that the fellow-servant rule should apply, it is necessary that the complainant and the servant whose negligence causes the wrong should have a common master.¹⁰⁸ It applies only where the servant sues his own master.¹⁰⁹ Therefore, damages to a servant for injury to his wife produced by the negligence of a fellow servant may be recovered from the employer.¹¹⁰

Where a servant in the general employ of one master is by him placed temporarily under the order of another, to do the latter's work, the servant of the latter, and the servant so placed to work with him, are fellow servants in that work, and neither master is liable for the damages resulting to one of those servants from the negligence of the other while performing the same.¹¹¹ The rule does not apply where the employment is the same but the masters different.¹¹² And, if the master personally assist in the common work,

¹⁰⁵ *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49.

¹⁰⁶ *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa, 421.

¹⁰⁷ Pol. Torts, 85; *Martin v. Chicago & A. Ry. Co.*, 65 Fed. 384; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Hough v. Texas & P. Ry. Co.*, 100 U. S. 213; *Gibson v. Railroad Co.*, 46 Mo. 163.

¹⁰⁸ *Sullivan v. Tloga R. Co.*, 112 N. Y. 643, 20 N. E. 569; *Johnson v. Netherlands Am. Steam Nav. Co.*, 132 N. Y. 576-578, 30 N. E. 505; *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092.

¹⁰⁹ *Smith v. New York & H. R. Co.*, 19 N. Y. 127-132; *Gerlach v. Edelmeier*, 88 N. Y. 645; *Johnson v. Lindsay* [1891] App. Cas. 371.

¹¹⁰ *Campbell v. Harris*, 4 Tex. Civ. App. 636, 23 S. W. 35; *Gannon v. Housatonic R. R.*, 112 Mass. 224.

¹¹¹ *Cregan v. Marston*, 126 N. Y. 573, 27 N. E. 952; *Winterbottom v. Wright*, 10 Mees. & W. 109.

¹¹² *Kelly v. Johnson*, 128 Mass. 530; *Phillips v. Chicago, M. & St. P. Ry. Co.*, 64 Wis. 475, 25 N. W. 544. As where servants of different masters are engaged on the same building. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101.

he is liable to his employés for his negligence.¹¹³ Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him; and, if the servant receives injuries in such employment from the negligence of a servant of the person to whom he is lent, he cannot recover therefor.¹¹⁴ Servants of different connecting lines are not fellow servants, whatever the agreement between those connecting lines may be.¹¹⁵ Servants of an employer and the servants of his independent contractors are not fellow servants.¹¹⁶

258. COMMON EMPLOYMENT—The English courts determine the relationship of fellow servants by the test of common employment.

Mr. Pollock states the rule as to common employment as follows: "All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellow servants. The kind of work need not be the same; the employer must be. They need not be engaged in the same department of service, but they must be working for a common object."¹¹⁷ The test is exceedingly unsatisfactory, because of the unavoidable difficulty of determining what is a common employment. This varies with the circumstances of the case. And so the test is so broad as to be of doubtful value in practical application. It almost leaves every case to be decided on its own facts. "The difficulty with the definition is that it needs defining."¹¹⁸

¹¹³ *Ashworth v. Stanwix*, 3 El. & El. 701; *Lorentz v. Robinson*, 61 Md. 64; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493.

¹¹⁴ *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759.

¹¹⁵ *Sullivan v. Tloga R. Co.*, 112 N. Y. 643, 20 N. E. 569; *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, 1 N. W. 112.

¹¹⁶ *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass. 461; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20.

¹¹⁷ *Pol. Torts*, 86-88. But see *Morgan v. Vale of Neath Ry. Co.*, 5 Best & S. 570, L. R. 1 Q. B. 149.

¹¹⁸ *Cooley, Torts*, 544, note 1; *Thomp. Neg.* 1026-1031.

259. VICE PRINCIPALS—The American cases¹¹⁹ incline to adopt, as the test of whether the plaintiff and another servant are fellow servants of the same master, the doctrine of vice principal.

260. A vice principal, as distinguished from a fellow servant, is one to whom the master has delegated some absolute duty owed by the master to his servants. For the negligence of such vice principal, at least so long as he is engaged in the performance of such duty, the master is responsible to other servants.

Confusion in Opinion.

There is probably no subject connected with the law of negligence that has given rise to more variety of opinion than that of fellow servants. The authorities are hopelessly divided upon the general subject, as well as upon the question here involved. "It is useless to attempt an analysis of the cases which have arisen in the courts of the several states, since they are wholly irreconcilable in principle, and too numerous even to justify citation."¹²⁰ It would seem, however, that there is a very general tendency on the part of American cases to refuse to determine the relation by mere reference to decisions that men in specified relations are or are not fellow servants, but to rest the determination of such questions upon the philosophical basis of performance of duty, and to adopt the doctrine of vice principal as a test of fellow servant.¹²¹

Negatively as to Who is a Vice Principal.

Many of the cases, and especially the earlier ones, undertook to define a fellow servant by contrasting him with some one having

¹¹⁹ *Hankins v. New York, L. E. & W. R. Co.*, 142 N. Y. 416, 37 N. E. 466; *Monmouth Min. & Manuf'g Co. v. Erling*, 148 Ill. 521, 36 N. E. 117. And see *Bailey, Mast. & S.* cc. 12-18.

¹²⁰ *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349-355, 14 Sup. Ct. 983. See *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184.

¹²¹ *Greenway v. Conroy*, 160 Pa. St. 185, 28 Atl. 692; *Card v. Eddy* (Mo. Sup.) 24 S. W. 746; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Crispin v. Babbitt*, 81 N. Y. 516; *Gunter v. Graniteville Manuf'g Co.*, 18 S. C. 262; *Moon's Adm'r v. Richmond & A. R. Co.*, 78 Va. 745; *Brown v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 553, 18 N. W. 834; *Hawkins v. Railroad Co.*, 11 N. Y. Law J. 84.

superintendence or control; that is, a "superior servant."¹²² The test is, however, generally abandoned, and it is generally accepted that difference in rank, position, or control does not determine whether or not given men are fellow servants.¹²³ Therefore, a section man and a section foreman are fellow servants.¹²⁴

It is quite clear, also, that, while thus a vice principal is not determined by rank, position, or control, neither is he determined by difference in employment. It is, however, by no means a necessary consequence that the doctrine of vice principal should exclude the test of common employment.¹²⁵ Such exclusion is likely to work great hardship, and to mark the departure as to master and servant from the general rule of law.¹²⁶ The tendency, however, would seem to be to hold that one who is not a vice principal is a fellow servant.¹²⁷ On this general subject the supreme court of the United

¹²² *Harrison v. Railroad Co.*, 79 Mich. 409, 44 N. W. 1034; *Newport News & M. V. Co. v. Dentzel's Adm'r*, 91 Ky. 42, 14 S. W. 958.

¹²³ *Hofnagle v. New York Cent. & H. R. R. Co.*, 55 N. Y. 608; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; *Allen, J.*, in *Wright v. New York Cent. R. Co.*, 25 N. Y. 562-565; *Hanna v. Granger (R. I.)* 28 Atl. 659; *Atchison, T. & S. F. R. Co. v. Martin (N. M.)* 34 Pac. 536; *Hathaway v. Illinois Cent. Ry. Co. (Iowa)* 60 N. W. 651.

¹²⁴ *Olson v. St. Paul, M. & M. Ry. Co.*, 38 Minn. 117, 35 N. W. 866. See, also, *Norfolk & W. R. Co. v. Hoover (Md.)* 29 Atl. 994; *Thom v. Pittard*, 40 C. C. A. 352, 62 Fed. 232. A superintendent may be a fellow servant. *Howard v. Hood*, 155 Mass. 391, 29 N. E. 630. But see *Chicago Anderson Pressed-Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572. Where a laborer on a work train is injured by the negligence of one who is both conductor of the train, and also foreman of the laborers,—having, in the latter capacity, power to hire and discharge the laborers at his discretion,—the question whether they are fellow servants is for the jury. *Mobile & O. R. Co. v. Massey*, 152 Ill. 144, 38 N. E. 787. See, also, *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779. Held not to be fellow servants: *Chicago Anderson Pressed-Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801.

¹²⁵ *Evans v. Carbon Hill Coal Co.*, 47 Fed. 437; *Nashville & C. R. Co. v. Carroll*, 6 Helsk. 347; *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413, 19 S. W. 412; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302.

¹²⁶ See *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914.

¹²⁷ *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49; *Neal v. Northern*

States has said: "To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service."¹²⁸

Performance of Duty the Test.

Positively one employé becomes vice principal of another only when he is intrusted with the performance of some absolute and personal duty of the master himself. These duties are not only absolute, but they are also inalienable and nonassignable. They may be devolved on others by the master, but not without recourse to him. For negligence in the discharge of these duties he is liable. It is immaterial whether such negligence is his own or that of his servant. In this sense the servant is the alter ego of the master or vice principal.¹²⁹ The master's absolute and personal duties have been already considered. Breach of any one of them by a servant is the master's wrong.

Thus, where the determination of the sufficiency of appliances for holding a railroad train in descending a grade was left to the conductor, the decision of the conductor was the decision of the railroad company, and the company was liable for the death of a brake-

Pac. R. Co., 57 Minn. 365, 59 N. W. 312. Generally, as to the adoption of the test of vice principal to the exclusion of the doctrine of common employment, see *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162, 6 N. W. 484; *Chamberlain v. Milwaukee & M. R. R. Co.*, 7 Wis. 425; *Cooper v. Milwaukee & P. D. Ry. Co.*, 23 Wis. 668; *Dwyer v. American Exp. Co.*, 55 Wis. 453, 13 N. W. 471; *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Dewey v. Detroit, G. H. & M. Ry. Co.*, 97 Mich. 329, 56 N. W. 756; *Potter v. New York Cent. & H. R. R. Co.*, 136 N. Y. 77, 32 N. E. 603; *Stutz v. Armour*, 84 Wis. 623, 54 N. W. 1000; *Schaible v. Lake Shore & M. S. Ry. Co.*, 97 Mich. 318, 56 N. W. 565.

¹²⁸ *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349-360, 14 Sup. Ct. 963.

¹²⁹ *Dillon, J.*, in 24 Am. Law Rev. 184. Et vide *Johnson v. Boston Towboat Co.*, 135 Mass. 209; *Sullivan v. Hannibal & St. J. Ry. Co.*, 107 Mo. 66, 17 S. W. 748; *Greenway v. Conroy*, 160 Pa. St. 185, 28 Atl. 692; *Chicago Anderson Pressed-Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556; *The Car Float No. 16*, 9 C. C. A. 521, 61 Fed. 364; *Hankins v. New York, L. E. & W. R. Co.*, 142 N. Y. 416, 37 N. E. 466.

man on such train, caused by the insufficiency of the appliances used.¹³⁰

Servants who are charged with the duty of supplying safe machinery are not to be regarded as fellow servants with those who are engaged in operating it.¹³¹

The negligence of inspectors is not the negligence of a fellow servant, but of a vice principal, and entitles a servant injured thereby to recover against the master.¹³²

Where, however, the general work includes the construction or preparation of the appliances (as where, in erecting a building, the employes construct a scaffold), they are fellow servants in respect to the negligence of one of them in constructing such appliances, as well as in respect to the negligence of such a one in doing other work. Here the master is said not to have undertaken the duty of furnishing or adopting the appliances by which the work is to be performed. This duty is assumed by the workmen themselves, and the master is exempt from responsibility if suitable materials are furnished and suitable workmen are employed by him.¹³³ But the cases are not in entire harmony.¹³⁴ If, however, the master was negligent in furnishing suitable material, and retained the direction and charge of the staging himself, he is liable.¹³⁵

Whether, in a given case, a given servant is a fellow servant or

¹³⁰ *Wooden v. Western N. Y. & P. R. Co.* (Super. Ct. Buff.) 16 N. Y. Supp. 840; *Pantzar v. Tilly Foster I. M. Co.*, 99 N. Y. 368, 2 N. E. 24; *Cadden v. American Steel Barge Co.*, 88 Wis. 409, 60 N. W. 800.

¹³¹ *Ford v. Fitchburg R. R.*, 110 Mass. 240.

¹³² *Chicago & E. I. R. Co. v. Kneirim*, 48 Ill. App. 243; *Id.*, 152 Ill. 458, 39 N. E. 324. *Contra*, *Jarman v. Chicago & G. T. Ry. Co.*, 98 Mich. 135, 57 N. W. 32.

¹³³ *Kelley v. Norcross*, 121 Mass. 508; *O'Keefe v. Brownell*, 156 Mass. 131, 30 N. E. 479; *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Peschel v. Chicago, M. & St. P. Ry. Co.*, 62 Wis. 338, 21 N. W. 269; *Filbert v. Delaware & H. Canal Co.*, 121 N. Y. 207-212, 23 N. E. 1108; *Nixon v. Selby Smelting & Lead Co.*, 102 Cal. 458, 36 Pac. 803.

¹³⁴ *Sims v. American Steel Barge Co.*, 56 Minn. 68, 57 N. W. 322; *Cadden v. American Steel Barge Co.*, 88 Wis. 409, 60 N. W. 800; *McNamara v. MacDonough*, 102 Cal. 575, 36 Pac. 941.

¹³⁵ *Arkerson v. Dennison*, 117 Mass. 407.

a plaintiff or a vice principal, is a question of law, and not one of fact.¹³⁶

The Doctrine of the Supreme Court of the United States.

In the celebrated case of *Chicago, M. & St. P. Ry. Co. v. Ross*,¹³⁷ a conductor, with supreme power and sole direction over his train, caused a collision by gross carelessness. Under the circumstances he was held not to be a fellow servant of the injured engineer. This case was commonly regarded as inconsistent with the general course of authority, holding that neither authority nor control of the servant (i. e. a superior servant), nor his grade in the employment, nor department of services were tests of who are and who are not fellow servants. The court, however, did not hold it to be "universally true that when one servant has control over another they cease to be fellow servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employes of the company acting under him on the same train. The conductor was, in the language of the opinion, clothed with the control and management of a distinct department. He was 'a superintending officer.' * * * He had 'the superintendence of a department.'" ¹³⁸ A later opinion of the supreme court held that an engineer and fireman are fellow servants. In this the courts say that the rightful test for determining who are fellow servants is: "There must be some personal wrong on the part of the master; some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. * * * The question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty,

¹³⁶ *McGinty v. Athol Reservoir Co.*, 155 Mass. 183, 29 N. E. 510.

¹³⁷ 112 U. S. 377, 5 Sup. Ct. 184.

¹³⁸ *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368-382, 13 Sup. Ct. 914.

then there should be some personal wrong on the part of the employer before he is held liable therefor." ¹³⁹

In *Gardner v. Michigan Cent. R. Co.*¹⁴⁰ it was distinctly recognized that the rule exempting the master from liability for injuries caused to a servant by a fellow servant is subject to the exception that the master is bound to use due care in furnishing safe instrumentalities for performing the work, and is liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care, or that of his agent to whom he intrusts the duty. However, in *Northern Pac. R. Co. v. Hambly*,¹⁴¹ Brown, J., selected as the most satisfactory test of liability this: If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow servant should not apply. It would thus seem that the supreme court, having originally accepted the test of superior servant, has finally adopted the test of a vice principal,¹⁴² without excluding common employment as a supplementary test.

261. CONCURRENT NEGLIGENCE OF MASTER—The plaintiff servant does not assume the risk of the negligence of a fellow servant where the master has been negligent in providing an improper fellow servant, unless the plaintiff servant can be held to have assumed such risk upon the principles governing the assumption of ordinary risks, exclusive of the risk of negligence of a fellow servant.

The servant has a right to rely upon the performance of the absolute duties of the master. One of these duties is to furnish proper and sufficiently numerous fellow servants. If, however, the master

¹³⁹ *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 920, 921.

¹⁴⁰ 150 U. S. 349, 360, 14 Sup. Ct. 140.

¹⁴¹ 154 U. S. 349-355, 14 Sup. Ct. 983.

¹⁴² *Atchison, T. & S. F. R. Co. v. Reesman*, 9 C. C. A. 20, 60 Fed. 370.

fails in the performance of these duties, and, notwithstanding such failure, a servant continues to work, for example, with a dangerously incompetent fellow servant,¹⁴³ or an insufficient number of them,¹⁴⁴ he assumes the risk of their negligence, subject to exceptions governing the assumption of ordinary risk. But, if the servant be placed at work with which he is unfamiliar, and different from and more hazardous than the service for which he is employed, he does not assume the risk of the negligence of a fellow servant.¹⁴⁵ Nor does he if the master promise to subsequently provide a safe fellow servant.¹⁴⁶ And it has been held that a servant's assumption of risk in working with an inexperienced servant waives the negligence of the company in furnishing such a servant, but that the waiver does not extend to any negligence of which the fellow servant himself may be guilty. "If he fails in any respect to come up to the measure of diligence which under the circumstances he ought to exercise, consent to serve with him would not cut off the right to recover for any injury occasioned by that negligence."¹⁴⁷

262. The servant assumes the risk of the negligence of his fellow servants, and not that of his master. If the injury of which he complains is caused by the concurrent negligence of both the master and a fellow servant, he is entitled to recovery.

The rule as to the exemption from liability of the master for injury to a servant caused by the negligence of a fellow servant is frequently said to apply only where the master has not been negligent in the selection of such careless or otherwise improper fellow serv-

¹⁴³ *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Southern Kansas Ry. Co. v. Drake*, 53 Kan. 1, 35 Pac. 825.

¹⁴⁴ *Warmington v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807; *Consolidated Coal & Min. Co. v. Clay's Adm'r*, 51 Ohio St. 542, 38 N. E. 610.

¹⁴⁵ *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401.

¹⁴⁶ *Wust v. Erie City Iron Works*, 149 Pa. St. 263, 24 Atl. 291; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Odell v. New York Cent. & H. R. R. Co.*, 120 N. Y. 323, 24 N. E. 478.

¹⁴⁷ *Richmond & D. R. Co. v. Morley*, 92 Ga. 84, 18 S. E. 361; *Francis v. Kansas City, St. J. & C. B. R. Co.*, 127 Mo. 658, 28 S. W. 842, and 30 S. W. 129.

ants. This, however, is too narrow a statement of the rule. The true principle would seem to be that this is only one of a class of cases where the wrong both of the master and of a fellow servant combine to do injury, and that, whenever the master has been guilty of a breach of duty to a servant, he cannot defend himself by saying that the negligence of a fellow servant also contributed to the injury.¹⁴⁸ Thus, an employer is liable for an injury to an employé caused by a defective machine, even though the negligence of a co-employé may have contributed to the result.¹⁴⁹ If, however, no negligence can be really traced to the master, as where a fellow servant selected an improper instrument when he could have had a proper one, the master is not liable.¹⁵⁰ But the concurrent negligence which may entitle a servant to recover notwithstanding the negligence of a fellow servant need not be the negligence of the master in person; it is sufficient if it be the negligence of a vice principal or superior servant who is not a fellow servant.¹⁵¹

263. STATUTORY CHANGES—The doctrine of fellow servants has been severely criticised and has been generally altered by statute.

The reaction of the rule against the master and servant appears less distinctly in the decisions of such states as Ohio, Kentucky, and Tennessee than in its repeal or modification by English and American statutes.¹⁵² In general, these statutes exempt employés

¹⁴⁸ *Craver v. Christian*, 36 Minn. 413, 31 N. W. 457; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Elmer v. Locke*, 135 Mass. 575; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285; *Browning v. Wabash Western Ry. Co.*, 124 Mo. 55, 27 S. W. 644.

¹⁴⁹ *Young v. New Jersey & N. Y. Ry. Co.*, 46 Fed. 160, affirmed 1 C. C. A. 428, 49 Fed. 723; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Rogers v. Leyden*, 127 Ind. 50-53, 26 N. E. 210.

¹⁵⁰ *Thyng v. Fitchburg R. R.*, 156 Mass. 13, 30 N. E. 169; *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471, 48 N. W. 1, 526, followed in *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350.

¹⁵¹ *Norfolk & W. Ry. Co. v. Phelps*, 90 Va. 665, 19 S. E. 652; *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636, 57 Fed. 915; *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 6 C. C. A. 281, 57 Fed. 125.

¹⁵² A partial collection of statutes will be found in 2 Harv. Law Rev. 212.

of railroad companies from the operation of the rule of fellow servants. The supreme court of the United States has sustained a Kansas statute of this character.¹⁵³ In some states acts of this kind have been held valid only so far as concerns those employés engaged in the peculiarly hazardous business of railroading.¹⁵⁴ On the other hand it has been held that the statute was not limited to any class of employés.¹⁵⁵ Unless the case at bar is shown to be within the scope of statutory provision the common-law rule as to fellow servants still prevails.

Et vide *Law Q. R.* (London) April, 1890; 24 *Am. Law Rev.* 63. The English employer's liability acts (e. g. 1875, 38 & 39 *Vict.*; 1880, 43 & 44 *Vict.*) are essentially enforced in Massachusetts and Alabama. *McCauley v. Norcross*, 155 *Mass.* 584, 30 *N. E.* 464; *Shinners v. Proprietors of Locks & Canals*, 154 *Mass.* 168, 28 *N. E.* 10; *Downey v. Sawyer*, 157 *Mass.* 418, 32 *N. E.* 654; *Cashman v. Chase*, 156 *Mass.* 342, 31 *N. E.* 4.

¹⁵³ *Missouri Pac. Ry. Co. v. Mackey*, 127 *U. S.* 205, 8 *Sup. Ct.* 1161.

¹⁵⁴ *McAunich v. Mississippi & M. R. Co.*, 20 *Iowa*, 338; *Missouri Pac. Ry. Co. v. Haley*, 25 *Kan.* 35; *Herrick v. Minneapolis & St. L. Ry. Co.*, 31 *Minn.* 11, 16 *N. W.* 413; *Steffenson v. Railway Co.*, 45 *Minn.* 355, 47 *N. W.* 1068.

¹⁵⁵ *Thompson v. Central Railroad & Banking Co.*, 54 *Ga.* 509; *Ditberner v. Chicago, M. & St. P. Ry. Co.*, 47 *Wis.* 138, 2 *N. W.* 69.

TABLE OF CASES CITED.

[THE FIGURES REFER TO PAGES.]

A

Abbot v. McCadden, 515.
Abbott v. Abbott, 125, 275.
 v. Kimball, 41.
 v. Macfie, 495.
 v. Railroad Co., 137.
Abercrombie v. Bradford, 404.
Abrahams v. Kidney, 271.
Abrams v. Milwaukee, L. S. & W.
 Ry. Co., 174.
Abrath v. North Eastern Ry. Co., 102.
Absor v. French, 391.
Ackerley v. Parkinson, 76.
Ackroyd v. Smith, 393.
Acton v. Blundell, 425.
Adams v. Bicknell, 356.
 v. Chicago, B. & N. R. Co., 440.
 v. Fletcher, 130.
 v. Freeman, 392.
 v. Lawson, 284.
 v. McGlinchy, 405.
 v. Olin, 190.
 v. Railroad Co., 224, 226-228.
 v. Rivers, 392, 396.
 v. Robinson, 201.
 v. Smith, 295.
 v. Tapling, 179.
 v. Waggoner, 119.
Adams Exp. Co. v. Stettaners, 174.
Adamson, Ex parte, 38.
Addington v. Allen, 342.
Aetna Ins. Co. v. Boon, 46.
Aetna Life Ins. Co. v. Paul, 104.
Agincourt, The, 56, 90.
Ahern v. Steele, 130, 443.
 v. Telegraph Co., 462.
Ahl v. Goodhart, 181.
Ahrens v. United Growers Co., 176.

Alkin v. Buck, 386, 388.
Akers v. Chicago, St. P., M. & O. Ry.
 Co., 476.
Alabama G. S. R. Co. v. Arnold, 236.
 v. Carroll, 64.
 v. Harris, 150.
 v. Linn, 466.
Alabama & T. R. R. Co. v. Kidd, 411.
Alair v. Northern Pac. R. Co., 174, 175.
Alamango v. Supervisors, 79.
Albertson v. Keokuk & D. M. Ry. Co.,
 502.
Albitz v. Railway Co., 39, 153.
Albright v. McTighe, 123.
Albro v. Jaquith, 161, 469.
Alcorn v. Chicago & A. Ry. Co., 517.
 v. Philadelphia, 108.
Aldine Manuf'g Co. v. Barnard, 468.
Aldred's Case, 422, 432.
Aldrich v. Press Printing Co., 102.
 v. Sager, 221.
 v. Weeks, 252.
 v. Wetmore, 443.
 v. Wright, 92, 115.
Aldridge v. Stuyvesant, 363.
Aldworth v. City of Lynn, 226, 227.
Alexander v. Alexander, 299.
 v. Blodgett, 256.
 v. Church, 343.
 v. Jacoby, 219.
 v. Jenkins, 204.
 v. Northeastern Ry. Co., 309.
 v. Pennsylvania Co., 64.
 v. Relfe, 103.
 v. Southey, 412.
 v. Town of New Castle, 217.
Alfred Shrimpton & Sons v. Philbrick,
 345.
Alger v. Lowell, 100.

[The figures refer to pages.]

- Aliston v. Nashville, C. & St. L. R. Co.,** 179.
Allaback v. Utt, 418.
Allaire v. Whitney, 202, 348.
Allan v. State S. S. Co., 473.
Allbutt v. General Council of Medical Education & Registration, 314.
Allec v. Reece, 76.
Allegheny v. Zimmerman, 221.
Allen v. Addington, 334.
 v. Codman, 352.
 v. Colby, 389.
 v. Crofoot, 391.
 v. G. W. & F. Smith Iron Co., 506.
 v. Hallet, 56.
 v. Kirk, 82.
 v. Leonard, 251.
 v. Merchants' Bank, 83.
 v. News Pub. Co., 294.
 v. Pioneer Press Co., 308, 320.
 v. Railway Co., 104, 233.
 v. Wright, 250.
Allison v. Chandler, 213.
 v. Chicago & N. W. R. Co., 210.
 v. Little, 181.
 v. Railway Co., 240.
Allsop v. Allsop, 295.
Alpern v. Churchill, 484.
Alton Lime & Cement Co. v. Calvey, 486.
Ambergate, N. & B. & E. J. Ry. Co. v. Midland Ry. Co., 383.
Amer v. Longstreth, 234.
American Preservers' Co. v. Drescher, 469.
American Print Works v. Lawrence, 56, 91, 391.
American Union Tel. Co. v. Middleton, 382.
American Waterworks Co. v. Dougherty, 233.
Ames v. Union R. Co., 265.
Amick v. O'Hara, 25, 32, 94, 451.
Amoskeag Manuf'g Co. v. Goodale, 202, 445.
Amstein v. Gardner, 390.
Amy v. Supervisors, 80.
Anderson v. Arnold's Ex'r, 34.
 v. Dunn, 73.
 v. How, 358, 360.
 v. Pacific Fire & Marine Ins. Co., 336.
Anderson v. Smith, 92.
Andrew v. Deshler, 324, 325.
Andrews v. Boedecker, 152.
 v. Hartford & N. H. R. Co., 189.
 v. Stone, 236.
 v. Vanduzer, 309.
Angell v. Loomis, 330, 332.
Angle v. Chicago, St. P., M. & O. Ry. Co., 363, 365.
Angus v. Clifford, 332.
Anon., 91, 250, 253, 290, 334, 357, 411, 459.
Anscomb v. Shore, 20.
Antcliff v. June, 361.
Anthony v. Haneys, 390.
 v. Railroad Co., 385.
Antle v. Sexton, 332.
Archbishop of Tuam v. Robeson, 292.
Ardesco Oil Co. v. Gilson, 135.
Arey v. City of Newton, 494.
Arkansas Tel. Co. v. Ratteree, 462.
Arkerson v. Dennison, 426.
Arkwright v. Newbold, 333.
Armitage v. Wildoe, 40, 97.
Armory v. Delamirie, 144, 405.
Armstrong v. Cooley, 459.
 v. Forg, 510.
 v. Lancashire & Y. R. Co., 497.
 v. Pierson, 231.
Armstrong Co. v. Clarion, 124.
Armytage v. Haley, 240.
Arnold v. Jewett, 297, 321.
 v. Railroad Co., 450.
Arthur v. Oakes, 198, 365, 370.
Artz v. Railroad Co., 466.
Arundel v. McCulloch, 56.
Asevado v. Orr, 356.
Ashby v. White, 50, 52, 58, 60, 200.
Asher v. Cabell, 185.
Ashley v. Port Huron, 106.
 v. Taylor, 183.
Ashlin v. White, 341.
Ashlock v. Vivell, 96.
Ashton v. Stock, 382, 386.
Ashworth v. Stanwix, 522.
Asser v. Finch, 391.
Atchison, T. & S. F. R. Co. v. Elder, 478.
 v. Hague, 477.
 v. McGinnis, 52.
 v. Martin, 524.
 v. Reesman, 476, 528.

[The figures refer to pages.]

Atchison, T. & S. F. R. Co. v. Tannet, 413.
 v. Weber, 115.
 v. Zeller, 512.
 Atchison & N. R. Co. v. Garside, 55, 86.
 Atkins v. Gladwish, 230.
 v. Moore, 406.
 Atkinson v. Goodrich Transp. Co., 48.
 v. Heer, 81.
 v. Newcastle & G. Water Works Co., 475.
 v. Transportation Co., 221.
 Atkinson Case, 475.
 Atlanta St. R. Co. v. Jacobs, 280.
 Atlas, The, 124.
 Atlas Engine Works v. Randall, 510.
 Atlee v. Packet Co., 496.
 Attorney General v. Eliche, 181.
 Atwill v. Mackintosh, 306.
 Audubon v. Excelsior Ins. Co., 182.
 Austin v. Dowling, 247.
 v. Holt, 381.
 v. Vrooman, 77, 247.
 Averill v. Chadwick, 112.
 Avery v. Halsey, 124.
 v. Ray, 262.
 Aycrigg's Ex'rs v. Railway Co., 147.
 Ayer v. Ashmead, 194.
 v. Bartlett, 404.
 v. City of Norwich, 428.
 Ayers, In re, 70.
 Ayre v. Craven, 300.
 Ayres v. Toulmin, 302.

B

B. v. Sheriff of Middlesex, 388.
 Babb v. Curators of the University of Missouri, 448.
 Babbage v. Powers, 136, 466.
 Babcock & Wilcox Co. v. Pioneer Iron Works, 195.
 Bachelder v. Chaves, 81.
 v. Heagan, 459.
 Bacheller v. Pinkham, 166.
 Backhouse v. Bonomi, 50, 191.
 Bacon v. City of Boston, 105, 440.
 v. Michigan Cent. R. Co., 284, 317, 319.
 Badder v. Keefer, 270.

Badger v. Phinney, 97, 99.
 Badgley v. Decker, 272.
 Bagby v. Harris, 59.
 Bagley v. People, 437.
 Bagshaw v. Gaward, 391.
 v. Goward, 392.
 Bailey v. Bussing, 125.
 v. Dean, 325.
 v. Lawrence Co., 109.
 v. Mayor, etc., 83.
 v. Merrell, 347.
 v. O'Bannon, 271.
 v. Publishing Co., 302.
 Baille v. Merrill, 341.
 Baily v. Birtles, 184.
 Bain v. Sandusky Transp. Co., 11.
 Bainard v. City of Newton, 424.
 Baird v. Boehner, 272.
 v. Householder, 350.
 v. Pettit, 149.
 Baker v. Barton, 260.
 v. Bolton, 184.
 v. Braslin, 126.
 v. Flint & P. M. Ry. Co., 503.
 v. Holtpzaffell, 132.
 v. Lothrop, 412.
 v. Lovett, 96.
 v. Secor, 121.
 v. Young, 126, 128.
 Baldwin v. Cole, 410.
 v. Elphinston, 285.
 v. Ensign, 430.
 v. Hayden, 260.
 Ball, Ex parte, 8.
 v. Axten, 34.
 v. Bennett, 128.
 v. Bruce, 268.
 v. Horrigan, 251.
 v. Liney, 412.
 v. McGeoch, 176.
 v. Palmer, 414.
 Ballentine v. Webb, 430, 447.
 Ballou v. Chicago, M. & St. P. Ry. Co., 506.
 Baltimore C. P. Ry. Co. v. Kemp, 20, 210, 214, 220, 221.
 v. McDonnell, 503.
 Baltimore Traction Co. v. Wallace, 116.
 Baltimore & L. T. Co. v. Cassell, 210.
 Baltimore & O. R. Co. v. Barger, 158.
 v. Baugh, 524, 527, 528.

[The figures refer to pages.]

- Baltimore & O. R. Co. v. Carr, 206, 231.
 v. Kean, 233.
 v. O'Donnell, 408, 412.
 v. Skeels, 172.
 v. State, 149.
 v. Sulphur Spring, etc., Dist., 49.
 Baltimore & P. R. Co. v. Fifth Baptist Church, 87, 88, 103, 441.
 v. Reaney, 45, 208, 217.
 Baltzer v. Chicago, M. & N. R. Co., 46, 491.
 Bamford v. Turnley, 434.
 Bancroft v. City of Cambridge, 55, 440.
 Bangs v. Little, 56.
 Banister v. Wakeman, 74.
 Bank v. Brainerd School Dist., 108.
 v. Forty-Second St. & G. St. F. R. Co., 104.
 v. Henty, 61, 303.
 Bank of Ky. v. Adams Exp. Co., 173.
 Bank of U. S. v. Daniel, 337.
 Bannon v. Lutz, 511.
 Banque Franco-Egyptienne v. Brown, 338.
 Barbee v. Reese, 209, 252.
 Barber v. Penley, 427.
 v. Scott, 62.
 Barbour v. Stephenson, 269, 272.
 Barclay v. Com., 446.
 Barden v. City of Portage, 106, 424.
 Bare v. Hoffman, 225.
 Barham v. Turbeville, 97.
 Barhight v. Tammany, 357.
 Barholt v. Wright, 119, 261.
 Barker v. Braham, 249.
 v. Railway Co., 279.
 Barkley v. Wilcox, 426.
 Barnard v. Bartlett, 389.
 v. Coffin, 164.
 v. Poor, 230.
 Barndt v. Frederick, 346, 347.
 Barnes v. Allen, 276, 277.
 v. Brown, 461.
 v. Campbell, 315.
 v. Chapin, 461.
 v. Crawford, 296.
 v. Racine, 6.
 v. Ward, 115, 428.
 Barnett v. Allen, 291.
 v. Earl of Guildford, 392.
 Barnett v. Reed, 361.
 Barnstable v. Thacher, 386.
 Barnum v. Chicago, M. & St. P. Ry. Co., 188.
 Barr v. Essex Trades Council, 363, 372, 374.
 Barrett v. Long, 307.
 v. Third Ave. R. Co., 193.
 v. White, 392.
 Barrick v. Schifferdecker, 224, 226.
 Barron v. City of Detroit, 107.
 Barrows v. Bell, 314.
 Barry v. Croskey, 339.
 v. Edmunds, 234.
 Barthold v. Philadelphia, 107.
 Bartlett v. Boston Gaslight Co., 130, 491.
 v. Christliff, 311.
 Bartley v. Richtmyer, 267, 268.
 Barton v. Home Ins. Co., 46.
 v. Kavanaugh, 62, 356.
 Bartonshill Coal Co. v. Ried, 157, 520.
 Barwick v. English Stock Bank, 153.
 Basebe v. Matthews, 352, 353.
 Basely v. Clarkson, 378.
 Bass v. Chicago & N. W. Ry. Co., 41, 156, 235.
 Bassett v. Bassett, 278.
 v. Fish, 85.
 v. Salisbury Manuf'g Co., 204.
 Bassil v. Elmore, 290.
 Baten's Case, 445.
 Bates v. Clark, 69.
 v. Pilling, 142.
 v. Preble, 191.
 Battishill v. Humphreys, 501.
 Battle v. McArthur, 179.
 Bauerschmitz v. Bailey, 128.
 Baughman v. Louisville, E. & St. L. R. Co., 175.
 Baum v. Holton, 336.
 v. Mullen, 128, 129.
 Baxter v. Railway Co., 145.
 v. Roberts, 510.
 Baylls v. Schwalbach Cycle Co., 159.
 Beach v. Hancock, 7, 233, 253, 254.
 v. Trudgain, 56.
 Beal v. Robeson, 357.
 Beals v. Thompson, 319.
 Beardslee v. Richardson, 475.
 Beatrice Gas Co. v. Thomas, 425.
 Beaty v. Perkins, 389.

[The figures refer to pages.]

- Beauchamp v. Saginaw Mining Co., 210, 459.
 Bebinger v. Sweet, 361.
 Becke v. Missouri Pac. Ry. Co., 499.
 Becker v. Janinski, 280, 495.
 v. Mason, 96, 270, 271.
 v. Smith, 385.
 Beckwith v. Philby, 250.
 v. Shordike, 14.
 Beddall v. Maitland, 259, 394.
 Bedford v. Bagshaw, 340.
 Beers v. State, 69, 70.
 Behrens v. McKenzie, 95.
 Beideman v. Atlantic City R. Co., 55, 440.
 Beir v. Cooke, 442.
 Belcher v. Costello, 336.
 Belden v. Chase, 496.
 Belknap v. Ball, 315.
 Bell v. Hansley, 119.
 v. Josselyn, 27, 166.
 v. Matthews, 353.
 v. Norfolk S. R. Co., 55, 86.
 v. Senneff, 80.
 Bellefontaine & I. R. Co. v. Snyder, 501.
 Belton v. Baxter, 465.
 Bement v. May, 176.
 Bender v. Fromberger, 206.
 Beneway v. Thorp, 299, 307.
 Benjamin v. Shea, 82.
 v. Storr, 436.
 Benner v. Atlantic Dredging Co., 86.
 Bennett v. Allcott, 119.
 v. Bennett, 278, 280.
 v. Fifield, 122.
 v. Judson, 331.
 v. New York Cent. R. R. Co., 501.
 v. Northern Pac. R. Co., 509.
 v. Smith, 277.
 v. Whitney, 80.
 Benson v. Railroad Co., 224.
 v. Remington, 267.
 v. Traction Co., 467.
 Benton v. Boston City Hospital, 110.
 v. Pratt, 324, 363.
 Benz v. Wiedeheoft, 296.
 Berg v. Baldwin, 241.
 v. City of Milwaukee, 464.
 v. Parsons, 135.
 Berger v. Gas Light Co., 32, 457.
 v. Jacobs, 280.
 Berger v. St. Paul, M. & M. R. Co, 509.
 Bergmann v. Jones, 293.
 Bernina, The, 497.
 Berrigan v. New York, L. E. & W. R. Co., 508.
 Bertholf v. O'Reilly, 221.
 Berthon v. Cartwright, 277.
 Bertle v. Flagg, 132.
 Beseman v. Pennsylvania R. Co., 55, 86, 87.
 Besenecker v. Sale, 187.
 Bethel v. Otis, 128.
 Bevard v. Hoffman, 74.
 Bicknell v. Dorion, 354.
 Biddle v. Bond, 405.
 Biel v. Horner, 407.
 Bieling v. City of Brooklyn, 106.
 Bielman v. Railway Co., 433.
 Bienenstok v. Ammidown, 168.
 Bigaouette v. Paulet, 276.
 Bigelow v. Sickles, 353.
 v. Stearns, 76.
 Bigelow Co. v. Heintze, 414.
 Billings v. Breinig, 477, 479.
 v. Lafferty, 74, 75.
 Billman v. Railroad Co., 219.
 Binford v. Johnston, 221, 459.
 Birchard v. Booth, 262.
 Bird v. Astcock, 407.
 v. Holbrook, 115.
 v. Jones, 243, 244.
 v. Smith, 179.
 Birge v. Gardner, 115.
 Birmingham Railway & Electric Co. v. Allen, 505.
 Bisbey v. Shaw, 310.
 Biscoe v. Railway, 55.
 Bishop v. Hendrick, 230.
 v. Montague, 40.
 v. Ranney, 252.
 v. St. Paul City Ry. Co., 220.
 v. Weber, 473.
 v. Williamson, 84, 85.
 Bishop of London v. Web, 401.
 Bittman v. Mize, 81.
 Bixby v. Brundige, 350.
 v. Dunlap, 265, 363, 371.
 Black v. Black, 344.
 v. Goodrich Transp. Co., 175.
 Blackham v. Pugh, 318.
 Blackman v. Bryant, 291.
 Blackwell v. Landreth, 241, 322.

[The figures refer to pages.]

- Blackwell v. Old Colony R. Co., 438.
 Blaen Avon Coal Co. v. McCulloh, 33,
 142, 378, 451.
 Blagge v. Ilsley, 267, 271.
 Blair v. Flack, 81.
 v. Railroad Co., 279.
 Blaisdell v. Leach, 37.
 v. Stone, 460.
 Blake v. Blackley, 129.
 v. Ferris, 121.
 v. Jerome, 390.
 v. Lanyon, 265.
 v. Lord, 208.
 v. Midland Ry. Co., 186.
 v. Thirst, 140.
 Blakely v. Smith, 121.
 Blakeman v. Blakeman, 302.
 Blanchard v. Ilsley, 268.
 Blann v. Crocheron, 193.
 Blatt v. McBarron, 115.
 Blaymire v. Haley, 267.
 Blazinski v. Perkins, 525.
 Blessington v. Boston, 136.
 Blin v. Campbell, 15.
 Blindell v. Hagan, 198.
 Block v. Railroad Co., 462.
 Blocker v. Schoff, 321.
 Blodgett v. Stone, 434.
 Blofeld v. Payne, 205.
 Blood Balm Co. v. Cooper, 472.
 Bloodgood v. Ayers, 425.
 Blue v. Christ, 366.
 Bluedorn v. Missouri Pac. R. Co., 487.
 Blumhardt v. Rohr, 303.
 Blunt v. McCormick, 225, 226, 229.
 Blyth v. Birmingham Waterworks Co.,
 26.
 v. Waterworks, 453.
 Blythe v. Denver & R. G. Ry. Co., 214.
 v. Tompkins, 248.
 Boardman v. Acer, 193.
 v. Gill, 411.
 v. Goldsmith, 237.
 v. Hayne, 79.
 Board of Com'rs v. Mutchler, 48.
 Board of Com'rs of Wabash Co. v.
 Pearson, 191.
 Board of Health v. Lederer, 442.
 v. New York Horse-Manure Co.,
 447.
 Board of Trade Tel. Co. v. Barnett,
 396.
- Boaz v. Central R. Co., 470.
 Bobb v. Bosworth, 390.
 Boccock v. Cochran, 77.
 Boden v. Demwolf, 241.
 Bodley v. Reynolds, 418.
 Bodwell v. Swan, 310.
 Boecher v. Lutz, 92.
 Boefer v. Sheridan, 399.
 Boeger v. Langenberg, 244, 351.
 Boehmer v. Detroit Free Press Co.,
 288, 314.
 Boerth v. Railroad Co., 466.
 Boggess v. Metropolitan St. Ry. Co.,
 240, 492.
 Bohan v. Port Jervis Gaslight Co., 421,
 429, 440.
 Bohn Manuf'g Co. v. Erickson, 509.
 v. Hollis, 367, 371, 374, 376.
 Bolan v. Williams, 85.
 v. Williamson, 84.
 Bolingbroke v. Swindon Local Board,
 144, 145.
 Bolivar Manuf'g Co. v. Neponset
 Manuf'g Co., 201.
 Bolton v. Miller, 272.
 Bonaparte v. Clagett, 408.
 Bond v. Chapin, 351.
 v. Ward, 82.
 Bonelli v. Bowen, 397.
 Bonino v. Caledonio, 262.
 Bonnell v. Smith, 32.
 Bonney v. Smith, 407.
 Bonomi v. Backhouse, 65, 422.
 Boogher v. Hough, 356.
 v. Knapp, 314.
 v. Life Ass'n, 102.
 Boom v. City of Utica, 431.
 Boorman v. Adams Exp. Co., 175.
 v. Brown, 4, 20.
 Booth v. Boston & A. R. Co., 49.
 v. Kurrus, 74, 247.
 v. Merriam, 132.
 v. Mister, 152.
 v. Railroad Co., 441.
 v. Sherwood, 387.
 Born v. Rosenow, 307.
 Borough of Susquehanna Depot v.
 Simmons, 108.
 Borradaile v. Brunton, 215.
 Bortun v. St. Paul, M. & M. Ry. Co.,
 355.
 Bosch v. Railroad Co., 46, 216.

[The figures refer to pages.]

- Boscowitz v. Adams Exp. Co., 174.
 Boston Belting Co. v. Boston, 88.
 Boston Ferrule Co. v. Hills, 432, 438.
 Boston & W. R. Corp. v. Dana, 8.
 Bostwick v. Lewis, 80.
 Bosworth v. Swansey, 113.
 Boulter v. Macauley, 264.
 Boulter v. Clark, 119.
 Boulware v. Craddock, 82.
 Bourke v. Warren, 288.
 Bourlier v. Macauley, 264, 364.
 Boutte v. Emmer, 75.
 Bovee v. Danville, 218, 232, 233.
 Bowas v. Pioneer Tow Line, 208, 220.
 Bowditch v. Mayor, etc., of Boston, 56, 91, 106.
 Bowe v. Hunking, 132.
 Bowen v. Hall, 263, 264, 303.
 v. Matheson, 308, 374.
 Bower v. Fenn, 331.
 v. Hill, 205.
 Bowers v. Horen, 93.
 Bowlin v. Nye, 407.
 Bowlsby v. Speer, 426.
 Bowyer v. Cook, 224.
 Box v. Jubb, 458.
 Boyd v. Byrd, 267.
 v. Flitt, 219.
 v. Insurance Patrol, 79, 111.
 v. Teague, 81.
 Boyd's Ex'r v. Brown, 330.
 Boyer v. Bishop of Norwich, 9.
 Boyle v. Brandon, 271.
 v. Case, 255.
 Boynton v. Shaw Stocking Co., 323.
 Boyson v. Thorn, 364.
 Brackett v. Griswold, 343.
 v. Lubke, 134.
 Bradford v. Boley, 218.
 v. Manly, 341.
 Bradlaugh v. Gossett, 311.
 Bradley v. Copley, 404.
 v. Fisher, 74-76.
 v. Plerson, 371, 376.
 v. Rea, 216.
 v. Shafer, 273.
 Bradner v. Faulkner, 360.
 Bradshaw v. Lancashire & Y. R. Co., 184.
 v. Van Winkle, 100.
 Bradstreet v. Everson, 145, 164.
 Bradstreet Co. v. Gill, 59.
 Brady v. Finn, 330.
 v. Northwestern Ins. Co., 46.
 v. Whitney, 193.
 Braithwaite v. Aiken, 21.
 Branfoot, The William, 240.
 Brannock v. Bouldin, 366.
 v. Elmore, 133.
 Brant v. Gallup, 201.
 Brasfield v. Lee, 224.
 Brass v. Maitland, 473.
 Bray v. Gunn, 43.
 Brayton v. City of Fall River, 438, 452.
 Brazil v. Moran, 126, 128.
 v. Peterson, 159.
 Bream v. Brown, 188.
 Breckwoldt v. Morris, 388.
 Bredin v. Bredin, 366.
 Bredlinger v. New Hanover Tp., 455.
 Breen v. Field, 79, 161, 166.
 Breitenberger v. Schmidt, 365.
 Breslin v. Peck, 194.
 Bretherton v. Wood, 470.
 Brettun v. Anthony, 302.
 Brewer v. Boston, etc., R. Co., 88.
 v. New York, L. E. & W. R. Co., 173.
 Brewster v. Sillman, 409.
 Brezee v. Powers, 482.
 Brick v. Bosworth, 489.
 Brickell v. New York Cent. & H. R. R. Co., 500.
 Bridge v. Grand Junction Ry. Co., 497.
 Briggs v. Garrett, 284.
 v. Minneapolis St. Ry. Co., 46.
 v. Railway Co., 411.
 v. Thompson, 385.
 Brigham v. Bussey, 83.
 Brill v. Flagler, 421, 429.
 Brink v. Railroad Co., 221.
 Brinsmead v. Harrison, 193, 194.
 Bristol v. Braidwood, 331.
 v. Burt, 404, 407.
 British Cast Plate Manufacturers v. Meredith, 57, 87.
 British & A. Mortg. Co. v. Tibballs, 164.
 Broadbent v. Ramsbotham, 427.
 Brobst v. Ruff, 357.
 Broderick v. Depot Co., 149.
 v. James, 59, 286.
 Bromage v. Prosser, 61, 303, 327.

[The figures refer to pages.]

- Brooker v. Coffin, 298.
 Brooklyn v. Railway Co., 162.
 Brooks v. Harison, 298.
 v. Haslam, 187.
 v. Mangan, 249.
 v. St. John, 78.
 v. Schwerin, 278.
 Broquet v. Trip, 216.
 Brosde v. Sanderson, 239.
 Broughton v. Jackson, 251.
 v. McGrew, 238, 319.
 Broult v. Hanson, 465.
 Brown v. Bowen, 424.
 v. Chadsey, 246, 247, 359, 360.
 v. Chicago, M. & St. P. R. Co.,
 209, 221.
 v. City of Cape Girardeau, 351,
 352.
 v. Cummings, 219.
 v. Durham, 59.
 v. Gilles, 460.
 v. Hannibal & St. J. R. Co., 114.
 v. Hawkes, 356.
 v. Howard, 56, 162.
 v. Kendall, 30, 31, 63.
 v. Kingsley, 272.
 v. Leach, 337, 346.
 v. Lynn, 116.
 v. McLeish, 136.
 v. Marshall, 34, 49, 473, 495.
 v. Massachusetts Title Ins. Co.,
 308.
 v. Minneapolis & St. L. Ry. Co.,
 523.
 v. Mosher, 82.
 v. Perkins, 383, 445.
 v. Postal Tel. Co., 173.
 v. Railroad Co., 87, 210, 220, 453,
 482.
 v. Randall, 353.
 v. Rice's Adm'r, 332.
 v. Searboro, 489.
 v. Shaw, 405.
 v. Sherer, 502.
 v. State, 241.
 v. Susquehanna Boom Co., 478.
 v. Swineford, 262.
 v. Vannaman, 318.
 v. Watson, 201.
 v. Winona & St. P. R. Co., 525.
 v. Winona & S. W. Ry. Co., 427.
 v. Wooton, 192, 193.
 Brown v. Wright, 41.
 Browne v. Dawson, 381.
 Brownell v. Durkee, 260.
 Browning v. Goodrich Transp. Co.,
 175.
 v. Owen Co., 107.
 v. Wabash Western Ry. Co., 530.
 Brown Paper Co. v. Dean, 165.
 Bruce v. Pettengill, 201.
 Bruch v. Carter, 383.
 Bruff v. Mall, 473.
 Brunner v. American Tel. & Tel. Co.,
 151.
 v. Downs, 75.
 v. Telegraph Co., 160.
 Brunsden v. Humphrey, 53, 62.
 Brushaber v. Stegemann, 245.
 Bryan v. Bates, 250.
 Bryant v. Carpet Co., 123.
 v. Herbert, 21.
 v. Jackson, 59, 95.
 v. Rich, 104, 150, 151.
 Bryom v. Chapin, 402.
 Buchanan v. Barnes, 369.
 v. Kerr, 369.
 Bucher v. Fitchburg R. Co., 113.
 Buchtella v. Stepanek, 113.
 Buckland v. Johnson, 193, 195.
 Buckley v. Cunningham, 132.
 Buckner v. Spaulding, 309.
 Buckstaff v. Viall, 288, 294, 311.
 Buddington v. Smith, 56.
 Buffalo Lubricating Oil Co. v. Stand-
 ard Oil Co., 376.
 Bullard v. Harrison, 57, 91.
 Bullitt v. Farrar, 331.
 Bullock v. Babcock, 25, 96, 97, 257.
 Bump v. Betts, 353.
 Bunch v. Kennington, 198.
 Bundy v. Maginess, 8.
 Bunting v. Hogsett, 498.
 Burcky v. Town of Lake, 88.
 Burdett v. Abbott, 389.
 Burdict v. Missouri Pac. Ry. Co., 505.
 Burditt v. Hunt, 416.
 v. Swenson, 437.
 Burford v. Wible, 309.
 Burger v. Railroad Co., 455.
 Burgess v. Graffam, 383.
 v. Gray, 136.
 v. Isherwood, 413.
 Burke v. Railway Co., 153.

[The figures refer to pages.]

Burke v. Smith, 432.
 v. Witherbee, 511.
Burkett v. Griffith, 325.
Burley v. Russell, 99.
Burling v. Read, 390, 395, 445.
Burnap v. Albert, 352.
 v. Marsh, 164.
 v. Wight, 201, 219.
Burnard v. Haggis, 98.
Burnett v. Tak, 324.
Burnham v. Seaverns, 97.
 v. Stevens, 77.
 v. Stone, 187.
Burns v. Dockray, 332, 334.
 v. Kirkpatrick, 275, 393.
Burnside v. Twitchell, 407.
Buron v. Denman, 69.
Burrill v. Stevens, 338.
Burroughes v. Bayne, 380, 403, 411, 415.
Burroughs v. Housatonic Ry., 430.
 v. Railroad Co., 457, 459.
Burrows v. March Gas & Coke Co., 217.
Burt v. Advertiser Newspaper Co., 282, 292, 316, 321.
 v. McBain, 279, 295.
Burtch v. Nickerson, 324.
Burton v. Fulton, 74.
 v. McClellan, 56, 91.
 v. Pinkerton, 219.
 v. St. Paul, M. & M. R. Co., 355.
 v. Smith, 459.
Busch v. Wilcox, 334.
Bush v. Sprague, 365.
Bushel v. Miller, 403.
Bussy v. Donaldson, 199, 205.
Busterud v. Farrington, 332, 336, 348.
Butler v. Kent, 80.
 v. McLellan, 56.
 v. Potter, 247.
 v. Railroad Co., 221, 487.
 v. Watkins, 102.
Butterfield v. Ashley, 265.
 v. Forrester, 493, 495.
Buttrick v. Lowell, 41.
Butts v. Phelps, 162.
Butz v. Ihrle, 424.
Buxendin v. Sharp, 460.
Buzzell v. Emerton, 248, 249.
 v. Manufacturing Co., 511.
Byam v. Collins, 304, 319.

Byers v. Nashville, O. & St. L. Ry. Co., 179.
Byford v. Girton, 128.
Byne v. Hatcher, 42.
 v. Moore, 359.
Byrd v. Husdon, 306.
Byrne v. Boadle, 484.
 v. Kansas City, Ft. S. & M. R. Co., 140.
 v. Railroad Co., 467.
 v. Stout, 413.

O

Cabot v. Christie, 331.
Cadden v. American Steel Barge Co., 526.
Cadle v. Railroad Co., 228.
Cahill v. Eastman, 457.
Cahn v. W. U. Tel. Co., 469.
Cahoon v. Railroad Co., 455.
Cairncross v. Village of Pewaukee, 62, 420.
Calder v. Halket, 77.
Caldwell v. Slade, 130, 458.
Call v. Buttrick, 434.
Callahan v. Ingram, 234, 303, 307, 312.
 v. Searles, 247.
 v. Warne, 481, 486.
Callan v. Wilson, 367.
Calvert v. Rice, 400.
Calwell v. Boone, 106.
Cameron v. Bryan, 234, 239.
Camp v. Whitman, 57.
Campan v. Campan, 414.
Campbell, Appeal of, 401.
 v. Carter, 276.
 v. City of Stillwater, 221.
 v. Cooper, 265.
 v. Harris, 521.
 v. Missouri Pac. Ry. Co., 485.
 v. Pullman Palace Car Co., 150, 209.
 v. Race, 56, 57, 91, 391.
 v. Railroad Co., 519.
 v. Seaman, 421, 429, 430, 433, 434.
 v. Sherman, 81.
 v. Spottiswoode, 314, 316.
 v. Stakes, 96, 98.

[The figures refer to pages.]

- Camp Point Manufg Co. v. Ballou, 511.
 Canal v. Newcomb, 6.
 Canal Co. v. Lee, 88.
 Candy v. Globe Rubber Co., 102.
 Cannam v. Farmer, 99.
 Canning v. Inhabitants of Williamstown, 52, 232.
 Cannon v. Barry, 398.
 v. Windsor, 101.
 Canton Surgical & Dental Chair Co. v. McLain, 300.
 Capel v. Lyons, 393.
 v. Powell, 126.
 Capital & Counties Bank v. Henty, 296, 303.
 Card v. Eddy, 485, 523.
 Cardival v. Smith, 353.
 Carew v. Rutherford, 265, 368, 371, 374.
 Carey v. Berkshire Ry. Co., 185.
 v. Sheets, 351, 360.
 Car Float No. 16, The, 525.
 Carhart v. Auburn Gas Light Co., 204.
 Carl v. Ayers, 355.
 v. Granger Coal Co., 201.
 Carleton v. Akron Sewer Pipe Co., 249.
 v. Haywood, 126, 128.
 Carlisle v. Callahan, 216.
 Carman v. Steubenville & I. R. Co., 141.
 Carpenter v. American Bldg. & Loan Ass'n, 409.
 v. Bailey, 313.
 v. McDavitt, 492.
 v. Manhattan Life Ins. Co., 417.
 v. Wright, 330.
 Carr v. Clarke, 266.
 v. Dodge, 414.
 v. Hood, 315, 316.
 v. State, 256.
 Carraher v. Bridge Co., 455.
 Carreau v. Chapotel, 129.
 Carrico v. West Virginia R. Co., 136, 493.
 Carrington v. Louisville & N. R. Co., 489.
 Carrol v. Bird, 319.
 Carroll v. Staten Island R. Co., 114.
 v. Wisconsin Cent. R. Co., 55, 434, 440.
 Carslake v. Mapledoram, 301.
 Carson v. Dessau, 246.
 Carstairs v. Taylor, 457, 458.
 Carter v. Berlin Mills Co., 139.
 v. Harlan, 393.
 v. Howe, 102.
 v. Towne, 45, 46, 459.
 v. Wallace, 52.
 Cartwright v. Elliott, 355.
 Cary v. Holt, 385.
 Case v. Ayers, 332.
 v. Cleveland, C., C. & St. L. Ry. Co., 175.
 v. Minot, 132, 443.
 Casebeer v. Mowry, 434.
 Case de Libellis Famosis, 283.
 Casement v. Brown, 134, 466.
 Case of King's Prerogative, 91.
 Case of Prerogative, 56.
 Casey v. Railroad Co., 466.
 v. Typographical Union, 374.
 Cashman v. Chase, 531.
 Cass v. Boston & L. R. Co., 469.
 Cassady v. Magher, 100.
 Cassidy v. Brooklyn Daily Eagle, 296.
 Cassin v. Delany, 126, 128.
 Castenholz v. Heller, 346.
 Castle v. Corn Exch. Bank, 411.
 v. Houston, 308.
 Catawissa R. Co. v. Armstrong, 522.
 Cate v. Cate, 33, 393.
 Catlett v. Young, 489.
 Catlin v. Valentine, 430.
 Cattle v. Stockton Waterworks Co., 61, 363.
 Cattlin v. Hills, 497.
 Catts v. Phalen, 97.
 Caughey v. Smith, 264, 265.
 Cauley v. Pittsburgh, C. & St. L. Ry. Co., 500.
 Cayford v. Wilbur, 474.
 Cayzer v. Taylor, 49.
 Center v. Finney, 31, 63.
 Central Railroad & Banking Co. v. Kitchens, 187.
 v. Smith, 103.
 Central Pass. Ry. Co. v. Chatterson, 235.
 Central Ry. Co. v. Brewer, 104.
 v. Peacock, 159.
 Central Transp. Co. v. Pullman's Palace Car Co., 137.

[The figures refer to pages.]

- Cerveny v. Chicago Daily News Co., 294.
- C. F. Simmons Medicine Co. v. Mansfield Drug Co., 89.
- Chace v. Warsaw Waterworks Co., 429.
- Chadbourne v. Straw, 385.
- Chadwick v. Herapath, 307.
- Chaffee v. U. S., 123.
- Chamberlain v. City of Oshkosh, 217.
v. Clayton, 79.
v. Hazelwood, 265.
v. Milwaukee & M. R. R. Co., 525.
v. Parker, 201.
- Chambers v. Baldwin, 4, 29, 363, 364.
v. Bedell, 390.
v. Robinson, 350.
- Champer v. State, 117.
- Champion v. Vincent, 202.
- Chandelor v. Lopus, 330, 337, 341.
- Chandler v. Com., 96.
v. Deaton, 97.
- Chandler Electric Co. v. Fuller, 430, 457.
- Chapel v. Hull, 400.
- Chapleyn of Greyes Inne, 258.
- Chapman v. Copeland, 202.
v. Erie R. Co., 508, 525.
v. New Haven R. Co., 498.
v. State, 7, 29, 71, 253, 254.
v. Telegraph Co., 232.
v. Thames Manuf'g Co., 201, 204.
- Charlebois v. Gogebic & M. R. Co., 133.
- Charlton v. Watton, 314.
- Chase v. Boughton, 336.
v. Heaney, 82, 474.
v. Ingalls, 81.
v. Whitlock, 59, 294.
- Chasemore v. Richards, 56, 426.
- Chataigne v. Bergeron, 29.
- Chatfield v. Wilson, 32, 426.
- Chatham v. Bradford, 83.
- Chatham Furnace Co. v. Moffatt, 332.
- Chattahoochee Brick Co. v. Braswell, 519.
- Cheatham v. Shearon, 459.
- Cheetham v. Hampson, 130, 133.
- Chellis v. Chapman, 269.
- Cheney v. Powell, 122.
- Chesapeake, O. & S. W. R. Co. v. Higgins, 188, 240.
- Chesapeake & O. Ry. Co. v. Hickey, 385.
v. Yost, 452.
- Chesebro v. Powers, 325.
- Cheshire Turnpike v. Stevens, 225.
- Chesley v. King, 33, 34, 327, 426.
v. Thompson, 295.
- Chicago v. Bixby, 160.
v. Jones, 236.
v. Joney, 108.
v. Kelly, 236.
v. Langlass, 236.
v. Martin, 236.
- Chicago Anderson Pressed-Brick Co. v. Reinneiger, 509.
v. Sobkowiak, 524, 525.
- Chicago, B. & Q. Ry. Co. v. Bryan, 235.
v. Dickson, 151, 280, 452.
v. Dunn, 280.
v. Grablin, 461.
v. Harwood, 466.
v. Hines, 233.
v. Warner, 496.
v. Wymore, 178.
- Chicago City Ry. Co. v. McMahon, 145.
v. Robinson, 501.
v. Wilcox, 463, 501.
- Chicago, K. & W. R. Co. v. Fisher, 461.
- Chicago, M. & St. P. Ry. Co. v. Ross, 112, 523, 527.
v. West, 147.
- Chicago, R. I. & P. R. Co. v. Lewis, 177.
v. Linney, 512.
v. Lonergan, 511.
v. Sutton, 48.
- Chicago, R. I. & T. Ry. Co. v. Hitt, 233.
- Chicago, St. L. & N. O. R. Co. v. Scurr, 236.
- Chicago, St. L. & P. R. Co. v. Barnes, 48.
v. Fry, 511.
v. Williams, 48.
- Chicago W. & V. Coal Co. v. Glass, 431, 459.
- Chicago & A. R. Co. v. Flagg, 206, 231, 233.
v. Kerr, 511.

[The figures refer to pages.]

- Chicago & E. I. R. Co. v. Kneirim, 526.
 v. Loeb, 226.
 Chicago & E. Ry. v. Flexman, 150.
 v. Holland, 231.
 v. Loeb, 442.
 Chicago & N. W. Ry. Co. v. Bayfield, 145.
 v. Chapman, 172.
 v. Dunleavy, 452.
 v. Moranda, 524.
 v. Williams, 102.
 Chicago & W. I. R. Co. v. Slee, 384.
 Chick v. Railway Co., 185.
 Chidester v. Consolidated Ditch Co., 49.
 Child v. Affleck, 319.
 v. Hearn, 500.
 Childers v. San Jose Mercury Printing & Publishing Co., 306.
 Childress v. Yourie, 221.
 Childs v. Bank, 102.
 v. Merrill, 329.
 v. New York, O. & W. Ry. Co., 492.
 v. Railroad Co., 461.
 Chinn v. Morris, 246.
 Chipley v. Atkinson, 363, 371.
 Chipman v. Bates, 389.
 v. Palmer, 122, 444.
 Chisholm v. Georgia, 71.
 Chisolm v. Gadsden, 334.
 Choen v. Porter, 128.
 Chopin v. Badger Paper Co., 517.
 Christian v. Columbus & R. Ry. Co., 151.
 v. Railroad Co., 467.
 Christiansborg, The, 64.
 Christopherson v. Bare, 119.
 Chrysler v. Canaday, 333.
 Church v. Mumford, 14.
 Churchill v. Baumann, 117.
 v. Holt, 124.
 v. Hulbert, 115.
 v. Hunt, 295.
 Cincinnati I. P. R. Co. v. Telegraph Ass'n, 462.
 Cincinnati, I., St. L. & C. R. Co. v. Cooper, 210.
 Cincinnati, N. O. & T. P. R. Co. v. Clark, 530.
 Cincinnati & Z. R. Co. v. Smith, 116.
 Citizens' St. R. Co. of Indianapolis v. Stoddard, 502.
 City Council v. Hudson, 107.
 City of Allegheny v. Zimmerman, 437.
 City of Americus v. Chapman, 106.
 City of Atchison v. King, 218.
 City of Beatrice v. Reid, 137.
 City of Bloomington v. Chicago & A. R. Co., 88.
 City of Boston v. Simmons, 365, 366.
 City of Brussels, The, 184.
 City of Chicago v. Babcock, 195.
 v. Elzeman, 231.
 v. Fowler, 463.
 v. Jones, 231.
 v. Langlass, 231.
 v. McCarthy, 463.
 v. Major, 188.
 City of Detroit v. Blackeby, 106.
 City of Elgin v. Joslyn, 468.
 City of Eufaula v. Simmons, 227.
 City of Franklin v. Harter, 464.
 City of Galesburg v. Rahn, 492.
 City of Grand Rapids v. Weiden, 444.
 City of Hannibal v. Richards, 444.
 City of Lanark v. Dougherty, 496.
 City of Lincoln v. Smith, 218.
 City of North Vernon v. Voegler, 227.
 City of Norwich v. Breed, 467.
 City of Orlando v. Pragg, 106, 107, 446.
 City of Pekin v. McMahon, 500.
 v. Newell, 107.
 City of Philadelphia v. Gilmartin, 107.
 City of Pontiac v. Carter, 106.
 City of Richmond v. Long, 84.
 City of Springfield v. Harris, 424.
 City of Sterling v. Schiffmacher, 137.
 City of Terre Haute v. Hudnut, 453, 474.
 City of Vicksburg v. Herman, 87.
 City of Wilmington v. Vandegrift, 106.
 City & Suburban Ry. Co. v. Moores, 135.
 Clapp v. Thomas, 182.
 Clark v. Anderson, 301.
 v. Chamberlain, 405.
 v. Chambers, 210, 220, 495.
 v. Downing, 255.

[The figures refer to pages.]

- Clark v. Draper**, 405.
 v. Famous Shoe & Clothing Co.,
 57, 91.
 v. Fitch, 267, 268.
 v. Foot, 459.
 v. Holdridge, 77.
 v. Keliher, 92.
 v. Lawrence, 447.
 v. Lovering, 165.
 v. Molyneux, 306, 317.
 v. Pennsylvania R. Co., 424.
 v. Railway Co., 187.
 v. Ralls, 346.
 v. St. Paul & S. C. R. Co., 515.
 v. Spicer, 77.
 v. Starin, 247.
 v. Wilson, 389.
 v. Woods, 83.
Clarke v. Milligan, 37.
Clarkson v. Lawson, 309.
Clay v. People, 292.
 v. Wood, 465.
Clegg v. Dearden, 224, 225.
 v. Warehouse Co., 411.
Cleland v. Thornton, 27.
Clemence v. Steere, 398.
Clements v. Light Co., 450.
 v. Louisiana Electric Light Co.,
 493.
Clementson v. Minnesota Tribune Co.,
 308.
Cleveland v. Citizens' Gaslight Co.,
 435.
 v. King, 106.
 v. Spier, 152.
Cleveland, C., C. & St. L. R. Co. v.
 Walter, 505.
Cleveland Rolling-Mill Co. v. Corri-
 gan, 464.
Clifford v. Atlantic Mills, 131, 458.
 v. Dam, 132, 428.
Clifton Iron Co. v. Dye, 447.
Clinton v. Myers, 32, 424.
Cloon v. Gerry, 356.
Clopton v. Cozart, 344.
Clough v. Tenney, 14.
Clow v. Chapman, 278.
 v. Plummer, 415.
Clugston v. Garretson, 299.
Clutterbuck v. Chaffers, 286.
Clyma v. Kennedy, 246, 258.
Cobb v. Columbia & G. Ry. Co., 151.
 v. Inhabitants of Standish, 218.
 v. Smith, 224, 226.
 v. Wright, 347.
Cochran v. Ammon, 272.
 v. Toher, 245.
Cochrane v. Quackenbush, 215.
Cochrane's Case, 275.
Cockayne v. Hodgkisson, 319.
Cockcroft v. Smith, 259.
Codd v. Cabe, 249.
Codding v. Wood, 179.
Codman v. Evans, 435.
Cœur d'Alene Consol. & Min. Co. v.
 Miners' Union of Wardner, 198, 368,
 375.
Coffin v. Coffin, 72, 311, 317.
 v. Varila, 233, 247.
Cofield v. McCabe, 159.
Cogdell v. Yett, 33, 208.
Coggs v. Bernard, 14, 20, 27, 453, 469.
Cogswell v. Railroad Co., 55, 439.
Cohen v. Railway Co., 145.
Cohoon v. Chicago, B. & Q. R. Co.,
 476.
Colburn v. Patmore, 113.
Colby v. McGee, 304.
 v. Reynolds, 292.
Cole v. Cassidy, 331.
 v. Corporation of Nashville, 37.
 v. Fisher, 29, 380.
 v. Neustadter, 298.
 v. Turner, 255.
Colegrove v. Railroad Co., 122, 123.
Coleman v. New York & N. H. R. Co.,
 210.
 v. Pearce, 153.
 v. Riches, 145.
 v. State, 70, 71.
Coles v. Clark, 415.
 v. Kennedy, 334.
 v. Louisville, E. & St. L. R. Co.,
 176.
 v. Wright, 410.
Colf v. Chicago, St. P., M. & O. Ry.
 Co., 517.
Collins v. Chartiers Val. Gas Co., 433.
 v. Dispatch Pub. Co., 294.
Colorado M. Ry. Co. v. O'Brien, 519.
Colrick v. Swinburne, 448.
Colter v. Lower, 360.

[The figures refer to pages.]

- Columbia Electric Co. v. Dixon**, 336.
Columbia Mill Co. v. Alcorn, 89.
 v. National Bank of Commerce, 39.
Colvin v. Peabody, 140, 490.
Comer v. Knowles, 246, 252.
Commercial Bank v. Varnum, 83.
Comminge v. Stevenson, 430, 459.
Commissioners of Baltimore Co. v. Baker, 109.
Commissioners of Kensington v. Wood, 429.
Commonwealth v. Carlisle, 367, 375.
 v. Clark, 259.
 v. Collberg, 119, 261.
 v. Crotty, 92.
 v. Deacon, 251.
 v. Donahue, 259.
 v. Haines, 83.
 v. Harris, 431.
 v. Hawkins, 257.
 v. Hunt, 367.
 v. Kennard, 92.
 v. McAfee, 274.
 v. McKie, 255.
 v. Magnolia, V. L. & I. Co., 234.
 v. O'Malley, 258.
 v. Parker, 117.
 v. Pierce, 257.
 v. Shelton, 374.
 v. Slattery, 8.
 v. Snelling, 302.
 v. St. Patrick Ben. Soc., 90.
 v. Stratton, 256.
 v. Tobin, 388.
 v. Union League of Philadelphia, 90.
 v. Upton, 432.
 v. Webb, 6.
 v. White, 7.
 v. York, 303.
Compton v. Richards, 422.
Comstock v. Matthews, 10.
Condict v. Railway Co., 48.
Cone v. Iverson, 414.
Congreve v. Smith, 132, 142, 428, 431.
Conhocton Stone Road v. Buffalo, 444.
Conlan v. Roemer, 336.
Conlon v. Oregon, S. L. & U. N. Ry. Co., 505.
Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 184, 185.
Connell v. Telegraph Co., 231.
Conner v. Dundee Chemical Works, 178.
Connolly v. Boston, 113.
Connor v. Woodfill, 420.
Connors v. Durite Manuf'g Co., 511.
Conrad v. Arrowhead Hot Springs Hotel Co., 429.
 v. Lane, 99.
Conrow v. Little, 181.
Conroy v. Pittsburgh Times, 304, 323.
Consolidated Coal Co. v. Scheller, 510.
Consolidated Coal Co. of St. Louis v. Haenni, 517, 518.
Consolidated Coal & Min. Co. v. Clay's Adm'r, 529.
Consolidated Ice Mach. Co. v. Keifer, 123, 148.
Constable v. National S. S. Co., 171.
Continental Ins. Co. v. Insurance Co. of Pennsylvania, 39.
Conway v. Grant, 460.
 v. Nicol, 239.
 v. Reed, 96.
Conwell v. Voorhees, 84.
Cook v. Hull, 201.
 v. Johnston, 478.
 v. Palmer, 85.
 v. Walley, 10.
 v. Wood, 276.
Cooke v. Bangs, 75, 76.
 v. England, 226.
 v. Waring, 461.
 v. Wildes, 318.
Coombs v. New Bedford Cordage Co., 469.
Coon v. Atwell, 336.
Cooper, In re, 74.
 v. Chitty, 409.
 v. Cooper, 38.
 v. Greeley, 302.
 v. Hart, 62, 357.
 v. Landon, 14.
 v. McKenna, 255.
 v. Milwaukee & P. D. Ry. Co., 525.
 v. Randall, 226, 430, 435, 443.
 v. Schlesinger, 332.
Copeland v. Draper, 460.
Copper v. Dolvin, 434.
Corcoran v. Corcoran, 294.
 v. Harran, 262.

[The figures refer to pages.]

- Cork v. Blossom, 32.
 Corley v. Lancaster, 60.
 Corliss v. E. W. Walker Co., 51.
 Cornelius v. Hambay, 276.
 v. Hultman, 242.
 Cornell v. Barnes, 84.
 Cornfoot v. Fowke, 145.
 Corning v. Corning, 33.
 Correll v. Burlington, C. R. & M. Ry.
 Co., 478.
 Corsair, The, 185, 232.
 Cory v. Silcox, 59, 202.
 Cosand v. Lee, 302.
 Cosgrove v. Ogden, 145.
 Oosulich v. Oil Co., 459.
 Cote v. Murphy, 367, 369.
 Cotteral v. Cummins, 14.
 Cotton v. Wood, 27, 482.
 Cottrill v. Chicago, M. & St. P. Ry.
 Co., 492.
 v. Krum, 345, 346.
 Cotulla v. Kerr, 285.
 Cotzhausen v. Simon, 332.
 Coughtry v. Globe Woolen Co., 522.
 Coulter v. Express Co., 491.
 v. Pine Tp., 467.
 Coulterville & Y. Turnpike Co. v.
 State, 70.
 Councils of Reading v. Com., 441.
 Count Joannes v. Bennett, 319.
 County Com'rs v. Duvall, 85.
 Coupland v. Hardingham, 428.
 Courtney v. Baker, 159.
 Coverdale v. Charlton, 386.
 Coward v. Baddeley, 257.
 Cowling v. Higginson, 395.
 Cox v. Burbridge, 430, 460.
 v. Cooper, 297.
 v. Hart, 380.
 v. Lee, 295.
 Coxhead v. Richards, 318.
 Craft v. Parker, Webb & Co., 473.
 Cragle v. Hadley, 102.
 Craig v. Hamilton, 344.
 v. Plunkett, 437.
 v. Pueblo Press Pub. Co., 288.
 Craker v. Railway Co., 150.
 Cramer v. Burlington, 100.
 v. Oppenstein, 81.
 Crane v. Waters, 315, 316.
 Crane Elevator Co. v. Lippert, 210,
 482.
 Cranford v. Tyrrell, 431, 434, 437, 446.
 Crater v. Binniger, 214.
 Cratty v. City of Bangor, 114.
 Craven v. Smith, 506.
 Craver v. Christian, 182, 530.
 Crawford v. Andrews, 203.
 Crawson v. W. U. Tel. Co., 233.
 Creed v. Hartmann, 123, 136.
 v. Kendall, 503.
 Cregan v. Marston, 521.
 Cregin v. Brooklyn Crosstown R.
 Co., 184.
 Crenshaw v. Ullman, 133, 136, 137.
 Crescent City Live-Stock Co. v.
 Butchers' Union Slaughterhouse
 Co., 356.
 Crispin v. Babbitt, 523.
 Cristman v. Cristman, 317, 318.
 Crittal v. Horner, 301.
 Croft v. Allison, 146.
 Crommellin v. Coxe, 443.
 Cronfeldt v. Arrol, 234.
 Crose v. Rutledge, 239.
 Crosland v. Pottsville Borough, 445.
 Cross v. Andrews, 94, 95.
 v. Barber, 411.
 v. Guthery, 185.
 v. Kent, 94.
 Crossman v. Rubber Co., 196.
 Crosson v. Olson, 81.
 Crowell v. Jackson, 335.
 Crown v. Orr, 514.
 Cruikshank v. Gordon, 300.
 Crumpley v. Hannibal & St. J. R.
 Co., 477.
 Crusselle v. Pugh, 361.
 Cuff v. Railroad Co., 133, 137.
 Culliford v. Gadd, 339.
 Culver v. Rhodes, 414.
 Cumberland v. Willisom, 87.
 Cumberland Telephone & Telegraph
 Co. v. United Electric Ry. Co., 63,
 420, 462.
 Cumberland & O. C. Corp. v. Hitch-
 ings, 224, 225.
 Cuming v. Brooklyn City R. Co., 272,
 273.
 Cunningham v. Brown, 80.
 v. East River Electric Light Co.,
 244.
 v. Macon & B. R. Co., 69.
 v. Railway Co., 97.

[The figures refer to pages.]

Curlewis v. Laurie, 388.
 Curran v. Arkansas, 70.
 v. Galen, 371.
 Currier v. Bilger, 179.
 v. Poor, 348.
 v. Swan, 238.
 Curry v. Chicago & N. W. R. Co., 116.
 Curtin v. Somerset, 471.
 Curtis v. Fairbanks, 80.
 v. Galvin, 384.
 v. Groat, 383.
 v. Janzen, 37.
 v. Kiley, 130, 133, 136.
 v. Mussey, 303.
 v. Railroad Co., 233, 482.
 Curtiss v. Colby, 83.
 v. Howell, 344.
 v. Livingston, 397.
 Cushman v. Ryan, 56.
 Cutler v. Smith, 397.
 Outting v. Seabury, 185.
 Cutts v. Spring, 386.

D

Dade Coal Co. v. Haslett, 101.
 Daggett v. Davis, 412.
 Dahlstrom v. St. Louis, I. M. & S. R.
 Co., 478.
 Dalley v. Canal Co., 224.
 v. Houston, 126.
 Dain v. Wycoff, 269.
 Dalay v. Savage, 130, 443.
 Dale v. Hall, 470.
 v. Harris, 317, 319.
 Dalyell v. Tyrer, 138.
 Dambmann v. Schulting, 345.
 Dame v. Dame, 407.
 Damon v. Inhabitants of Seituete,
 465.
 Dampert v. Sympson, 80.
 Danby v. Beardsley, 354.
 Dand v. Kingscote, 395.
 Daniel v. New York News Pub. Co.,
 59, 295.
 v. Railway Co., 482.
 Daniels v. Potter, 428.
 v. Railroad Co., 455.
 Danner v. Railroad Co., 451.
 Dare v. Heathcote, 395.

Darley Main Colliery Co. v. Mitchell,
 27, 223.
 Darlington v. Mayor, 106.
 Davenport v. Prince, 190.
 Daves v. Southern Pac. Co., 161.
 David v. Park, 344, 346.
 Davidson v. Burke, 178.
 v. Cornell, 517.
 v. Goodall, 268.
 Davies v. Mann, 493, 495.
 v. Solomon, 291.
 Davis v. California Street Cable R.
 Co., 477.
 v. Central Vt. R. Co., 171.
 v. Clark, 397.
 v. Clinton Waterworks Co., 475.
 v. Davis, 343, 344, 348.
 v. Duncan, 313.
 v. Elmore, 387.
 v. Gardiner, 291.
 v. Guarneri, 34, 473, 488.
 v. Hawkins, 191.
 v. Inhabitants of Dudley, 218.
 v. Kendall, 200.
 v. Lewis, 322.
 v. Marxhausen, 282, 303, 320.
 v. Montgomery, 106.
 v. Nicholas, 412.
 v. Reeves, 318.
 v. Russell, 246.
 v. Sawyer, 435.
 v. Shepstone, 316.
 v. Society, 468.
 v. Somerville, 113.
 Davison v. Duncan, 314.
 Dawe v. Morris, 18, 338, 344, 348.
 Dawkins v. Antrobus, 90.
 v. Lord Rokeby, 75.
 v. Prince Edward of Saxe-Wei-
 mar, 75.
 Dawling v. Wenman, 79.
 Dawson v. Schloss, 355.
 Day v. Brownrigg, 50.
 v. Edwards, 14.
 v. Highland St. Ry. Co., 113.
 v. Lumber Co., 465.
 v. Woodworth, 234, 418.
 Deacon v. Greenfield, 41.
 Dean v. Depot Co., 150.
 v. Keate, 474.
 v. Metropolitan El. Ry. Co., 127.

[The figures refer to pages.]

- Dean v. Nelson, 101.
 v. Peel, 266, 267.
 v. Raplee, 255.
 v. State, 261.
 v. Taylor, 260.
- Dearborn v. Dearborn, 14.
- Dearbourn v. Union Nat. Bank, 412.
- Debs, In re, 198.
- Decatur v. Fisher, 236.
- Decker v. Gammon, 460.
- De Courcey v. Cox, 76.
- De Crespigny v. Wellesley, 322.
- Deford v. Miller, 292.
- Defries v. Davis, 97.
- De Harn v. Mexican Nat. Ry. Co., 65.
- De Haro v. U. S., 393.
- Dehring v. Comstock, 483.
- Delacroix v. Thevenot, 285, 286.
- Delaney v. Kaetel, 289.
- Delaware & H. Canal Co. v. Torrey, 201, 204.
- Delaware & R. Canal Co. v. Wright, 226.
- Delz v. Winfree, 89, 371, 374, 375.
- De Mahy v. Morgan's L. & T. R. R. & S. S. Co., 502.
- Demarest v. Hardham, 430, 433.
- De May v. Roberts, 51.
- Deming v. Darling, 337.
 v. Merchants' Cotton-Press & Storage Co., 48.
- Dempsey v. Chambers, 40, 42.
- Den v. Kinney, 400.
- Denby v. Willer, 87.
- Dennis v. Clark, 273.
 v. Johnson, 301, 310.
 v. Stoughton, 219.
- Denny v. New York Cent. R. Co., 216.
 v. Railroad Co., 48.
- Denson v. Ham, 81.
- Dent v. Davison, 201.
- Denton v. Great Northern Ry. Co., 340.
- Denver City Irrigation & Water Co. v. Middaugh, 224.
- Denver & R. G. Ry. Co. v. Harris, 104, 115, 236, 395.
- Derry v. Flitner, 215.
 v. Peek, 332, 335, 340.
- De S. v. De S., 252, 254.
- Desmond v. Brown, 284.
- Detroit v. Osborne, 106.
 v. Putnam, 109.
- Detroit Daily Post Co. v. McArthur, 102, 236.
- Detroit & M. R. Co. v. Van Steinburg, 451.
- De Vaughn v. Heath, 237.
- Devendorf v. Wert, 204.
- Devereux v. Barclay, 27, 407, 408.
- Devlin v. Snellenburg, 382.
- Dewey v. Detroit, 106.
 v. Detroit, G. H. & M. Ry. Co., 512, 514, 525.
 v. Leonard, 459.
- Dexter v. Alfred, 388.
 v. Cole, 383.
 v. Harrison, 288.
 v. Spear, 205, 304.
- De Yampert v. Johnson, 81.
- Deyo v. Van Valkenburgh, 202, 243.
 v. Waggoner, 215.
- Dhein v. Beuscher, 385, 387.
- Dicas v. Lord Brougham, 74.
- Dick v. Railroad Co., 481.
- Dickenson v. Watson, 29.
- Dickey v. Franklin Bank, 411.
- Dickins v. New York Cent. R. Co., 188.
- Dickinson v. Barber, 59, 95.
 v. Boyle, 49.
 v. Railway Co., 188.
- Dicks v. Brooks, 324.
- Dickson v. Chicago, R. I. & P. R. Co., 131.
 v. Dickson, 363.
 v. Omaha & St. L. Ry. Co., 476.
- Diehl v. Friester, 243.
- Dillard v. Collins, 309.
- Dillon, Et vide, 156.
 v. Burnham, 99.
- Directors of Central Ry. Co. of Venezuela v. Kisch, 336.
- Directors, etc., of Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal-Nav. Co., 424.
- Ditberner v. Chicago, M. & St. P. Ry. Co., 531.
- Dividson v. Goodall, 268.
- Dixon v. Bell, 152, 472.
 v. Chicago & A. R. Co., 524.
 v. Clow, 52, 201, 390.
 v. White Sewing Mach. Co., 380.
- Dobbin v. Cordiner, 128.
- Dobbins v. Brown, 486.

[The figures refer to pages.]

- Dobell v. Stevens, 336, 346.
 Dodge v. Davis, 397.
 v. Essex Co. Com'rs, 55, 86, 87.
 v. Granger, 106.
 Doe v. Roe, 278.
 Doedt v. Wiswall, 186.
 Doellner v. Tynan, 56, 90.
 Doherty v. Allman, 403.
 v. Inhabitants of Braintree, 107.
 Dolahanty v. Lucey, 382.
 Dolbeer v. Livingston, 37.
 Dole v. Erskine, 119, 259.
 v. Insurance Co., 45, 208.
 v. Lyon, 322.
 Dollard v. Roberts, 273.
 Donahoe v. Richards, 74, 75, 273.
 v. Wabash, St. L. & P. Ry. Co.,
 57, 91, 103.
 Donahue v. Shippee, 378.
 Donald v. Suckling, 411.
 Donlin v. McQuade, 412.
 Donnell v. Jones, 215.
 Donoghue v. Hayes, 59.
 Donohue v. Woodbury, 179.
 Donovan v. Laing, 140.
 v. McAlpin, 79, 83, 85.
 v. Oakland & B. Rapid Transit
 Co., 136.
 v. Railroad Co., 490.
 Dooley v. Seventeen Thousand Five
 Hundred Head of Sheep, 122.
 Dooling v. Budget, 325.
 Dooly v. Stringham, 401.
 Dority v. Dunning, 224.
 Dorris v. Sullivan, 396.
 Dougherty v. Stepp, 382.
 Douglas v. Douglas, 294.
 Dovaston v. Payne, 396.
 Downer v. Lent, 77.
 Downey v. Pittsburg, A. & M. Trac-
 tion Co., 485.
 v. Sawyer, 510, 531.
 Downing v. Diaz, 380.
 v. McFadden, 75.
 Downs v. Finnegan, 403.
 v. Hawley, 309.
 Dox v. Postmaster General, 69.
 Doyle v. Jessup, 267.
 v. Railway Co., 132, 461.
 v. St. Paul, M. & M. Ry. Co., 514.
 Drake, Ex parte, 194.
 v. Gilmore, 188.
 Drake v. Klely, 219.
 v. Lowell, 428.
 v. Shorter, 407.
 v. State, 308.
 Draper v. Fulkes, 126.
 Dressel v. Shipman, 288, 320.
 Dresser v. Blair, 262.
 Drew v. Comstock, 259.
 v. Hicks, 441.
 v. Peer, 150.
 Drewell v. Towler, 396.
 Driess v. Frederick, 210.
 Driggs v. Burton, 361.
 Drinkhorn v. Bubel, 260.
 Drinkwater v. Sauble, 446.
 Drohan v. Lake Shore & M. S. Ry.
 Co., 177.
 Drown v. Allen, 322.
 Du Bois v. Decker, 473, 495.
 Du Bois Borough v. Baker, 290.
 Duckett v. Pool, 265.
 Dudley v. Briggs, 325.
 Dueber Watch-Case Manuf'g Co. v.
 E. Howard Watch Co., 374.
 Duff v. Hutchinson, 179.
 Duffles v. Duffles, 278.
 Dugan v. Chicago, St. P., M. & O. Ry.
 Co., 485.
 Duggan v. Baltimore & O. R. R., 232,
 247.
 v. Wright, 412.
 Duke of Brunswick v. King of Han-
 over, 72.
 Dumesnil v. Dupont, 447.
 Dun v. City Nat. Bank of 'Birming-
 ham, 154, 164, 173.
 Dunbar v. Railway Co., 176.
 v. Tirey, 176.
 Duncan v. Findlater, 84.
 v. Griswold, 354.
 v. Markley, 224.
 Duncombe v. Felt, 402.
 Dundee Mortgage & Trust Inv. Co.
 v. Hughes, 82, 471.
 Dunlap v. Glidden, 80.
 v. Linton, 190.
 Dunlay v. Wagner, 221.
 Dunlop v. Munroe, 84, 85.
 Dunn v. Burlington, C. R. & N. R.
 Co., 239.
 Dunning v. Bird, 92.
 Dupee v. Lentine, 262.

[The figures refer to pages.]

Durand v. Borough of Ansonia, 55, 86.
 Durant v. Mining Co., 451, 478.
 Durgin v. Kennett, 477.
 Duryea v. Mayor, etc., 226, 227.
 v. Smith, 392.
 Dusenbury v. Kielly, 27.
 Dusy v. Helm, 76.
 Duthie v. Town of Washburn, 106.
 Dutton v. Gerrish, 132.
 Duval v. Davey, 238.
 v. Hunt, 485.
 Duvall v. Peach, 141.
 Dwight v. Insurance Co., 481.
 Dwinelle v. New York Cent. & H. R. R. Co., 140.
 Dwyer v. American Exp. Co., 525.
 Dye v. Denham, 236. :
 Dygert v. Bradley, 31, 63.
 v. Schenck, 428, 430, 441.

E

Eager v. Grimwood, 272.
 Eaglesfield v. Londonderry, 337.
 v. Marquis of Londonderry, 166.
 Eakin v. Brown, 131.
 Eames v. Railroad Co., 221
 v. Whittaker, 317.
 Earing v. Lansingh, 465.
 Earl v. De Hart, 446.
 Earl of Dartmouth v. Spittle, 386.
 Earl of Leicester v. Walter, 322.
 Earl of Lonsdale v. Nelson, 420.
 Earp v. Lee, 446.
 Eastern Counties R. Co. v. Broom, 41.
 Eastman v. Amoskeag Manuf'g Co., 55, 439, 444.
 v. Grant, 195.
 v. Meredith, 108.
 East St. Louis Connecting Ry. Co. v. O'Hara, 452.
 East Tennessee, V. & G. Ry. Co. v. Fleetwood, 239.
 v. Kane, 140.
 v. Lilly, 188.
 v. Lockhart, 210.
 East Tennessee & W. N. C. R. Co. v. Collins, 508.
 Eastwood v. Holmes, 288.
 Eaton v. Hill, 99.

Eaton v. Johns, 295.
 v. Lyman, 201.
 v. Railway Co., 49, 211.
 v. Winnie, 333, 346.
 Eaton, Cole & Burnham Co. v. Avery, 342.
 Eberly v. Rupp, 62.
 Eckerson v. Crippen, 393.
 Eckert v. Long Island R. Co., 57, 91, 118, 492.
 v. Railroad Co., 491.
 Eden v. Lexington & F. R. Co., 185.
 Edgerly v. Whalan, 412.
 Edgerton v. Huff, 424.
 v. New York & H. R. Co., 484.
 Edgington v. Fitzmaurice, 336, 342.
 Edmondson v. City of Moberly, 55, 439.
 v. Machell, 264, 265, 268.
 Edwards v. Ferguson, 75.
 v. Kansas City Times Co., 309.
 v. Railway Co., 41, 466.
 v. San José Print. & Pub. Soc., 322.
 Eells v. St. Louis, K. & N. W. Ry. Co., 174.
 Egan v. Murray, 271.
 Ehgott v. Mayor, 108, 216, 220.
 Eichert v. Schaffer, 180.
 Ekins v. Tresham, 336.
 Eldridge v. Atlas S. S. Co., 519.
 Elkins v. McKean, 473.
 v. Railroad, 466.
 Ellegard v. Ackland, 148.
 Ellet v. St. Louis, etc., Co., 49.
 Ellington v. Ellington, 267, 268, 270.
 v. Taylor, 287.
 Elliot v. Porter, 193.
 v. Railroad Co., 204, 491.
 Elliott v. Brown, 260.
 v. Hayden, 193.
 v. Philadelphia, 106.
 v. Railway Co., 466, 481, 491.
 v. Van Buren, 210, 482.
 Ellis v. Cleveland, 117, 215, 219, 221.
 v. Esson, 195.
 v. Iowa City, 55, 86.
 v. Sheffield Gas Consumers' Co., 136.
 v. Whitehead, 288, 289, 307.
 Ellis' Estate, In re, 181.
 Elmer v. Fessenden, 287.

[The figures refer to pages.]

Elmer v. Locke, 530.
 Elwell v. Martin, 100.
 Ely v. Ehle, 385.
 v. Parsons, 85.
 v. Supervisors, 446.
 Embrey v. Owen, 58, 201, 424.
 Emersol v. Cochran, 62, 351, 358.
 Emery v. City of Lowell, 206, 231.
 v. Ginnan, 353, 361.
 v. Hapgood, 248.
 Emmens v. Pottle, 286.
 Emmerson v. Marvel, 302.
 Emmett v. Lyne, 245.
 Empire Gold Min. Co. v. Bonanza
 Gold Min. Co., 201.
 Emry v. Roanoke Navigation &
 Water-Power Co., 3, 385, 450.
 Enders v. Beck, 128.
 Endsley v. Johns, 342.
 Enfield v. Colburn, 343.
 Engel v. Eureka Club, 135.
 v. Smith, 492.
 Engelhardt v. State, 256.
 England v. Bourke, 309.
 v. Cowley, 403, 408, 410, 412.
 Engleker v. Hilger, 100.
 Enos v. Enos, 307, 323.
 Entick v. Carrington, 382, 383.
 E. O. Stanard Milling Co. v. White
 Line Cent. Transit Co., 171.
 Episcopal Academy v. Philadelphia,
 112.
 Erickson v. St. Paul & D. R. Co., 509.
 Ericson v. Duluth & I. R. R. Co., 479.
 Erie City Iron Works v. Barber, 102,
 215.
 Erie City Pass. Ry. Co. v. Schuster,
 103, 502.
 Erie Tel. & Tel. Co. v. Grimes, 496.
 Eshleman v. Martic Tp., 427.
 Eslava v. Jones, 80.
 Esmay v. Fanning, 411.
 Estell v. Myers, 344.
 Estey v. Smith, 32.
 Estill v. Fort, 129.
 Esty v. Wilmot, 361.
 Etchison v. Pergerson, 306, 308, 317.
 Eten v. Luyster, 30, 208.
 Euler v. Sullivan, 433.
 Evans v. Carbon Hill Coal Co., 524.
 Evans v. Edmonds, 331.
 Evans v. Railroad Co., 220, 441, 466.

Evans v. Waite, 119.
 v. Walton, 265, 266.
 Evansville & T. H. R. Co. v. Griffin,
 467.
 Evarts v. Kiehl, 310.
 Everett v. Coffin, 415.
 v. Council Bluffs, 106.
 v. Henderson, 248, 249, 350, 360.
 Eviston v. Cramer, 235, 316.
 Ewald v. Chicago & N. Ry. Co., 149.
 Ewing v. Ainger, 297.
 v. Railway Co., 52, 488.
 Exchange Nat. Bank v. Third Nat.
 Bank, 163.
 Express Co. v. Caldwell, 175.
 Eyre v. Garlick, 283.
 Eyres v. Sedgewicke, 80.

F

Fabens v. Bank, 164.
 Fadden v. Satterlee, 190.
 Fahn v. Reichart, 459.
 Fairbanks v. Kerr, 219.
 Falk v. U. S., 71.
 Faloin v. O'Brien, 460.
 Fallon v. Manning, 406.
 Faloon v. Schilling, 327, 432.
 Fanning v. Chace, 299.
 Fanson v. Linsley, 38.
 Fargis v. Walton, 393.
 Faris v. Lewis, 216.
 Farmer v. Sir Robert Darling, 357.
 Farmers' Loan & Trust Co. v. North-
 ern Pac. R. Co., 198, 367-369.
 Farmers' Loan, etc., Co. v. Wal-
 worth, 42.
 Farmers' Stock-Breeding Ass'n v.
 Scott, 343.
 Farmers' & Mechanics' Bank v.
 Butchers' & Drovers' Bank,
 145.
 v. Champlain Transp. Co., 172.
 Farnham v. Camden & A. R. Co.,
 175.
 v. Pierce, 79.
 Farnsworth v. Lowery, 403.
 Farrand v. Aldrich, 295, 323.
 Farrar v. Beswick, 414.
 v. Rollins, 407.
 Farrer v. Close, 370.

[The figures refer to pages.]

- Farwell v. Boston & W. R. Corp.**, 157, 520, 521, 524.
Fassett, In re, 10.
Faulk v. Central R. & B. Co., 493.
Fay v. Haven, 202.
 v. Minneapolis & St. L. Ry. Co., 515.
 v. Whitman, 433.
Featherstonhaugh v. Johnston, 412.
Felcher v. McMillan, 412.
Fell v. Northern Pac. R. Co., 451.
Felt v. Amidon, 119.
Feltham v. Cartwright, 394.
Fenneman v. Holden, 464, 496.
Fent v. Railway Co., 40, 219.
Fenwick v. Bowling, 329.
 v. Grimes, 338.
Ferguson v. Arnow, 355.
 v. Brooks, 129.
 v. Earl of Kinnoull, 77.
 v. Gies, 59.
Fernsler v. Moyer, 268.
Fero v. Ruscoe, 309.
Ferren v. Old Colony R. Co., 517.
Fertich v. Michener, 251.
Fertilizing Co. v. Hyde Park, 55, 430, 432, 433.
Fette v. Lane, 410.
Fetter v. Beal, 182, 222.
Flick v. Railway Co., 145.
Fidelity Title & Trust Co. v. People's Natural Gas Co., 179.
Field v. Albemarle Co., 108.
Fields v. Grenills, 258.
 v. Williams, 386.
Fifth Ave. Bank v. Forty-Second St. & G. St. F. R. Co., 104.
Filbert v. Delaware & H. Canal Co., 526.
Filburn v. Aquarium Co., 460.
Filler v. Smith, 251.
Filkins v. People, 259.
Filliter v. Phippard, 459.
Finch v. Board of Education, 108.
 v. Great Western Ry. Co., 395.
Findlay v. McAllister, 365.
Finley v. Gutter, 248.
 v. Hershey, 225.
Finn v. Frink, 350.
Finney v. Smith, 231.
Fire Ins. Patrol v. Boyd, 111.
Firestone v. Rice, 244.
First Baptist Church v. Schenectady & T. R. Co., 429.
First Nat. Bank v. Clements, 83.
 v. Fourth Nat. Bank, 83.
 v. Indianapolis Piano Manuf'g Co., 194.
 v. Kickbusch, 412.
First Nat. Bank of Colorado Springs v. Wilbur, 406.
First Nat. Bank of Lyons v. Ocean Nat. Bank, 453.
First Presbyterian Congregation of Easton v. Smith, 108.
Fischer v. Langbein, 248.
Fish v. Cleland, 337.
 v. Dodge, 421.
 v. Ferris, 98.
 v. Kelly, 471.
Fisher v. Boston, 57, 108.
 v. Bristow, 10, 352.
 v. Thirkell, 130, 182.
Fishkill Sav. Inst. v. National Bank, 102, 103.
Fitch v. New York, P. & B. R. Co., 384.
Fitler v. Fossard, 40.
Fitter v. Veal, 27.
Fitts v. Hall, 97, 99.
Fitzgerald v. Cavin, 118.
 v. Connecticut River Paper Co., 118, 518.
 v. Fitzgerald & Mallory Const. Co., 101.
 v. Quann, 128.
 v. St. Paul, M. & M. R. Co., 500.
Fitzpatrick v. Slocum, 83.
Fivaz v. Nicholls, 113.
Fizzell v. Duffer, 85.
Flaherty v. Minneapolis & St. L. Ry. Co., 123.
 v. Moran, 432.
Flanders v. Tweed, 230.
Fleener v. State, 8.
Fleischner v. Cable Co., 173.
 v. Pacific Postal Tel. Co., 469.
Fleming v. Town of Shenandoah, 231.
Flemming v. Ball, 56.
Flesh v. Lindsay, 129.
Fletcher v. Fletcher, 251, 412.
 v. People, 261.
 v. Rylands, 30, 63, 283, 431, 456, 457.

[The figures refer to pages.]

- Flike v. Boston & A. R. Co., 523.
 Flinn v. State, 25.
 Flora v. Russell, 357.
 Florida South R. Co. v. Hirst, 489.
 Flower v. Pennsylvania R. Co., 505.
 Floyd v. Barker, 73.
 v. Brown, 196.
 Fluker v. Railroad Co., 264, 265.
 Foakes v. Beer, 178.
 Fogg v. Boston & L. R. Corp., 102,
 235.
 v. Griffin, 102.
 Folger v. Washburn, 357.
 Follett v. Edwards, 412.
 Folsom v. Apple River Log-Driving
 Co., 448.
 Foot v. Card, 278.
 Forbes v. Board of Health, 106.
 v. King, 291, 297.
 v. Railroad Co., 407.
 Ford v. Beech, 177.
 v. Cheever, 242.
 v. Chicago, R. I. & P. Ry., 505,
 515.
 v. Fitchburg R. R., 526.
 v. Monroe, 185.
 v. Parker, 85.
 v. Railroad Co., 224.
 v. Taggart, 92.
 Forde v. Skinner, 234.
 Fordyce v. Edwards, 519.
 Foreman v. Weil, 37.
 Forney v. Geldmacher, 221.
 Forsdick v. Collins, 412.
 Forsyth v. Hooper, 134.
 Ft. Smith Oil Co. v. Slover, 518.
 Fortune v. Trainor, 159.
 Ft. Worth & D. C. Ry. Co. v. Burton,
 52.
 Forward v. Adams, 301.
 Fosburg v. Phillips Fuel Co., 507.
 Foshay v. Ferguson, 355.
 v. Town of Glen Haven, 428.
 Foster v. Charles, 330.
 v. Essex Bank, 146, 147, 150.
 v. Metts, 84.
 v. Perkins, 384.
 v. Rhinehart, 86.
 v. Rockwell, 43.
 v. Scripps, 315.
 Fotheringham v. Adams Exp. Co.,
 245.
- Fouldes v. Willoughby, 383, 407, 408,
 410, 416.
 Foulger v. Newcomb, 300.
 Fournet v. Steamship Co., 279.
 Fow v. Roberts, 443.
 Fowle v. New Haven & Northampton
 Co., 226, 229.
 Fowler v. Dowdney, 298.
 v. Gilman, 416.
 v. Hollins, 416.
 v. Jenkins, 32.
 v. McCann, 342.
 v. Water-Works Co., 471.
 Fowles v. Bowen, 285, 319.
 Fox v. Gaunt, 250.
 v. Thibault, 83.
 v. Wunderlich, 237.
 France v. Gaudet, 418.
 Francis v. Kansas City, St. J. & C. B.
 R. Co., 529.
 v. St. Louis Transfer Co., 219.
 v. Schoellkopf, 201, 430, 434.
 v. W. U. Tel. Co., 174, 175, 232.
 Francisco v. Aguirre, 82.
 Franke v. City of St. Louis, 130.
 Frankhouser v. Cannon, 82.
 Franklin v. Brown, 335, 336.
 v. Frey, 242.
 v. McCorkle, 271.
 Franklin Coal Co. v. McMillan, 400.
 Fraser v. Echo Mining & Smelting
 Co., 200.
 Fratini v. Caslini, 276.
 Fray v. Blackburn, 73, 74.
 Frazer v. Berkeley, 262.
 Frazier v. Brown, 32, 425, 426.
 v. Cauthers, 395.
 v. Lloyd, 461.
 v. McCloskey, 307.
 v. Turner, 244.
 Fredericks v. Railroad Co., 151.
 Fredericksen v. Singer Manufg Co.,
 261.
 Freeman v. Adams, 40.
 v. Boland, 96, 98, 414.
 v. Cornwall, 75.
 v. Grant, 410.
 v. Venner, 348.
 Freese v. Crary, 201.
 Freethy v. Freethy, 275.
 French v. Bancroft, 244.
 v. City of Boston, 109.

[The figures refer to pages.]

French v. Connecticut River Lumber Co., 448.
 v. Detroit Free Press Co., 286.
 v. Vining, 335, 340.
 v. Wilkinson, 461.
 Fresh v. Cutter, 319.
 Friedlander v. Railway Co., 153.
 Friesenhahn v. Bushnell, 162.
 Fritts v. Railroad Co., 455.
 Fritz v. Railroad Co., 88.
 Frizzel v. Duffer, 85.
 Frome v. Dennis, 407, 412, 416.
 Frost v. Berkeley Phosphate Co., 431.
 v. Domestic Sewing Mach. Co., 102.
 v. Railroad Co., 464.
 Fry v. Bennett, 302.
 v. Drestler, 276.
 v. Leslie, 96.
 v. Railroad Co., 233.
 Frye v. Moor, 457.
 Fugate v. Millar, 357.
 Fullam v. Rose, 128.
 v. Stearns, 202.
 Fuller v. Jewett, 510.
 v. Kemp, 179.
 Fulton v. Hood, 335, 342.
 Fulton Bag & Cotton Mills v. Wilson, 173.
 Fulton Co. St. R. Co. v. McConnell, 133.
 Furlong v. Banta, 181.
 Furman v. Van Sise, 267, 268.

G

Gabrielson v. Waydell, 525.
 Gage v. Hampton, 395.
 v. Lewis, 338.
 Gahan v. W. U. Tel. Co., 233.
 Gaines v. Belding, 299.
 v. Green Pond Iron Min. Co., 399.
 Gaither v. Advertiser Co., 298.
 Galbes v. Girard, 69.
 Galbraith v. Fleming, 117, 119.
 Gale v. Parrott, 264.
 Galena & C. U. R. Co. v. Jacobs, 496.
 Gallagher v. Brunell, 338.
 Gallagher v. Bowle, 279.
 v. Dodge, 33.

Gallagher v. Humphery, 26.
 v. Kemmerer, 122, 195.
 v. Stoddard, 353.
 Galliard v. Laxton, 249.
 Galligan v. Kelly, 317.
 Galpin v. Railroad Co., 430.
 Galveston, H. & S. A. Ry. Co. v. Arispe, 508.
 v. Le Glerse, 236.
 v. Templeton, 510.
 Galveston Oil Co. v. Morton, 467.
 Galvin v. Bacon, 393.
 Gamble v. Mullin, 221.
 Gandy v. Jubber, 131.
 Gannon v. Hargadon, 426.
 v. Housatonic R. R. 521.
 Ganssly v. Perkins, 236.
 Gardner v. Railroad Co., 481, 528.
 Garfield v. Douglass, 74.
 Gargrave v. Smith, 392.
 Garing v. Fraser, 80.
 Garland v. Towne, 428.
 Garnett v. Ferrand, 75.
 Garr v. Selden, 311.
 Garret v. Taylor, 371.
 Garretson v. Becker, 233, 269.
 Garrett v. Chicago & N. W. R. Co., 486.
 v. Mannheimer, 356.
 Garrison v. Graybill, 118.
 Gaslight & Coke Co. v. Vestry of St. Mary Abbott's, 55, 86.
 Gassett v. Gilbert, 303.
 Gates v. Blincoe, 445.
 v. Lounsbury, 260.
 v. Meredith, 95.
 v. Miles, 94.
 v. Railroad Co., 46, 208.
 Gaunt v. Fynney, 435.
 Gauvreau v. Superior Pub. Co., 300.
 Gavett v. Railroad Co., 481.
 Gay v. Winter, 187.
 Geer v. Darrow, 134.
 Gelzenleuchter v. Niemeyer, 248, 350.
 Genesee Co. Sav. Bank v. Michigan Barge Co., 342.
 Genner v. Sparkes, 245, 246.
 Gentleman v. Soule, 392.
 George v. Fisk, 49.
 v. Gobey, 146.
 v. Skivington, 340, 471-473.

[The figures refer to pages.]

- George and Richard, The, 215.
 Georgetown, B. & L. Ry. Co. v. Doyle, 88.
 v. Eagles, 214.
 Georgia Midland & G. R. Co. v. Evans, 485.
 Georgia Pac. Ry. Co. v. Dooley, 173.
 v. Lee, 452.
 Georgia Railroad & Banking Co. v. Rhodes, 491.
 Geraty v. Stern, 150.
 Gerdes v. Foundry Co., 106.
 German Bank of Memphis v. U. S., 70.
 Gerlach v. Edelmeyer, 521.
 Gerrish v. New Market Manuf'g Co., 202.
 Gibbons v. U. S., 69, 70.
 Gibbs v. Ames, 350.
 v. Chase, 383, 409.
 v. Hannibal, 189.
 v. Randlett, 244.
 Giblyn v. McMullen, 454.
 Gibney v. State, 492.
 Gibson v. Leonard, 476, 480.
 v. Railroad Co., 521.
 v. Western New York & P. R. Co., 177.
 Giese v. Schultz, 272.
 Gifford v. Wiggins, 249.
 Gilbert v. Crystal Fountain Lodge, 103.
 v. Kennedy, 397.
 v. People, 310, 311.
 v. Railroad Co., 455.
 Gile v. Stevens, 201.
 Giles v. Simonds, 393.
 v. Walker, 422.
 Gilford v. Babies' Hospital, 429.
 Gill v. Weston, 406.
 Gillespie v. Beecher, 259.
 Gilliam v. Railway Co., 159.
 Gillingham v. Ohio R. R. Co., 247.
 Gilman v. Lowell, 287.
 Gilson v. Collins, 166.
 v. Spear, 98, 99.
 v. Wood, 386, 405.
 Gladwell v. Steggall, 473, 475.
 Glaspie v. Keator, 332.
 Glass v. Bennett, 277.
 Glassey v. Hestonville Ry. Co., 501.
 Glavin v. Hospital, 111.
 Gleason v. Gary, 434.
 Gleeson v. Virginia Midland R. Co., 49.
 Glenn v. Kays, 391.
 Gloucester Grammar School Case, 56.
 Goddard v. Railway, 104, 233, 235.
 Godfrey v. Soniat, 357.
 Godley v. Hagerty, 132.
 Godshalk v. Metzgar, 314.
 Goetz v. Borough of Butler, 108.
 Goff v. Chippewa River & M. Ry. Co., 516.
 Gold v. Bissell, 246, 248.
 Goldberg v. Dobberton, 285.
 Golderman v. Stearns, 301.
 Goldsmith's Adm'r v. Joy, 238, 262.
 Gooch v. Association, 112.
 Good v. Altoona City, 425.
 v. Towns, 188.
 Goodale v. Tuttle, 427.
 Goodall v. Crofton, 447.
 Goodfellow v. Boston, H. & E. R. Co., 522.
 Goodlander Mill Co. v. Standard Oil Co., 44, 49, 473.
 Goodman v. Kennell, 145.
 Goodno v. Oshkosh, 231.
 Goodnow v. Willard, 200, 203.
 Goodrum v. State, 256.
 Goodsell v. Taylor, 517.
 Goodwin v. Trust Co., 332.
 Goodwin v. Cheveley, 390.
 Gordon v. Bruner, 20.
 v. Harper, 404, 405.
 v. Parmelee, 337, 346.
 Gorham v. Ives, 296.
 Gormely v. Gymnastic Ass'n of South Side, 337.
 Gorton v. Railway Co., 466.
 Gott v. Pulsifer, 306, 315, 316.
 Gough v. Goldsmith, 285.
 Gould v. McKenna, 421.
 v. Wise, 37.
 Govaski v. Downey, 357.
 Gove v. Insurance Co., 450.
 Grable v. Margrave, 238, 272.
 Grace v. Dempsey, 252.
 Graham v. City of Albert Lea, 106.
 v. Gautier, 474.
 v. Hollinger, 330.
 v. McReynolds, 270.
 v. Meyer, 168.
 v. Peat, 386.
 v. Railroad Co., 236.
 Grainger v. Hill, 246, 361.

[The figures refer to pages.]

- Gramlich v. Wurst, 467.
 Grandona v. Lovdal, 445.
 Grand Rapids Booming Co. v. Jarvis, 448.
 Grand Rapids & I. R. Co. v. Huntley, 486.
 Grand Trunk Ry. Co. v. Cummings, 522, 530.
 v. Ives, 482.
 v. Latham, 163.
 Grant v. City of Erie, 27, 106.
 v. Moseley, 29.
 Graver v. Sholl, 201.
 Graves v. Dawson, 352, 353.
 v. Railroad Co., 175.
 Gray v. Ayres, 445, 446.
 v. Baker, 300.
 v. Boston Gaslight Co., 124.
 v. Elzroth, 322.
 v. Harris, 457.
 v. Merriam, 470.
 v. Pentland, 305.
 Greathouse v. Summerfield, 245.
 Green v. Button, 61, 326.
 v. Cochran, 352.
 v. Dunn, 412.
 v. Elgie, 247.
 v. Goddard, 380, 382.
 v. Hudson River R. Co., 185, 186.
 v. Lake, 446.
 v. Louisville, N. O. & T. R. Co., 491.
 v. Omnibus Co., 103.
 v. Russell, 412.
 v. Sperry, 98.
 v. Thompson, 186.
 Greene v. Cole, 398.
 v. Minneapolis & St. L. Ry. Co., 516, 518, 519.
 Greenleaf v. Egan, 162.
 Greenway v. Conroy, 517, 523, 525.
 v. Fisher, 416.
 Greenwood v. Cobbey, 301, 312.
 v. Greenwood, 267.
 v. Town of Westport, 10.
 Gregory v. Bush, 427.
 v. Duke of Brunswick, 371.
 v. Fichtner, 190, 412.
 v. Piper, 142.
 Gribble v. Pioneer Press Co., 301, 307.
 Grider v. Tally, 77.
 Griffin v. Chubb, 356.
 Griffin v. Coleman, 250.
 v. Mayor, 106.
 v. Ohio & M. Ry. Co., 509.
 v. Reynolds, 129.
 Griffing v. Diller, 141, 343.
 Griffiths v. Teetgen, 266.
 v. Wolfram, 161.
 Griggs v. Day, 417.
 v. Fleckenstein, 219.
 Grigsby v. Stapleton, 335.
 Grimsley v. Hankins, 188.
 Grinnell v. Wells, 264, 267, 272.
 Grisby v. Clear Lake Waterworks Co., 445.
 Griswold v. Gebbie, 332.
 v. Haven, 40, 153.
 v. Railway Co., 172.
 Grogan v. Adams Exp. Co., 174.
 Gross v. Miller, 114.
 Grosso v. Delaware, L. & W. R. Co., 185.
 Grotton v. Glidden, 119.
 Grove v. Bradenburg, 80.
 v. Ft. Wayne, 428.
 v. Nevill, 99.
 v. Van Duyn, 76.
 Grubbs' Appeal, 400.
 Grube v. City of St. Paul, 106.
 Grumon v. Raymond, 77, 249.
 Grunberg v. Grant, 82.
 Grund v. Van Vleck, 121.
 Guest v. Reynolds, 52, 422.
 v. Warren, 359.
 Guggenheim's Case, 490.
 Guille v. Swan, 44, 219, 382.
 Guinney v. Hand, 159, 160.
 Guldager v. Rockwell, 179.
 Gulf, C. & S. F. Ry. Co. v. Danshank, 494.
 v. Elliott, 175.
 v. Hohl, 514.
 v. Hume, 175.
 v. Jackson, 507.
 v. James, 357.
 v. Johnson, 116.
 v. Kirkbride, 41.
 v. Levy, 232.
 v. Reed, 41, 235.
 v. Steele, 63.
 v. Trott, 52.
 Gunn v. Ohio River R. Co., 503.
 Gunsolus v. Lormer, 384, 394.

[The figures refer to pages.]

Gunter v. Astor, 371.
 v. Graniteville Manuf'g Co., 523.
 Gurley v. Armstead, 416.
 Gurnsey v. Lovell, 251.
 Gustafson v. Wind, 236.
 Guth v. Lubach, 299.
 Gutsole v. Mathers, 324.
 Gwinnell v. Eamer, 131.

H

Haag v. Board of County Com'rs, 106, 107.
 Haas v. Missionary Soc., 110.
 Hackett v. Hackett, 10.
 Haden v. Sioux City & P. R. Co., 116.
 Hadley v. Baxendale, 215.
 v. Cross, 459.
 v. Heywood, 276.
 Haehl v. Wabash R. Co., 150, 160.
 Haenni v. Bleisch, 338.
 Hagan v. Blindell, 198.
 v. Providence & W. R. Co., 235.
 v. Railroad Co., 482.
 Hagebush v. Ragland, 129.
 Hager v. Danforth, 200.
 Haggart v. Stehlin, 437.
 Haggerty v. Central R. Co., 188.
 Hague v. Wheeler, 110.
 Hahn v. Cooper, 267.
 Haight v. Badgeley, 265.
 v. Hayt, 332.
 Haines v. Schultz, 235.
 Haire v. Miller, 190.
 Hale v. Clark, 392.
 v. Lawrence, 56.
 Haley v. Chicago & N. W. Ry. Co., 187.
 v. Jump River Lumber Co., 133.
 Hall, In re, 106.
 v. Booth, 250.
 v. Chicago, B. & N. R. Co., 240.
 v. Corcoran, 98.
 v. Hollander, 273.
 v. Railroad Co., 453.
 v. Smith, 79, 80, 84.
 Hallam v. Post Pub. Co., 303, 316, 321.
 Halleck v. Mixer, 20.
 Hailey, The, 64.
 v. Gregg, 322.

Halligan v. Chicago & R. I. R. Co., 384, 385.
 Hallock v. Kinney, 270.
 Halsey v. Brotherhood, 325.
 v. Woodruff, 123.
 Halsted v. Colvin, 153.
 Haluptzok v. Great Northern Ry. Co., 41.
 Ham v. Mayor, etc., 108.
 Hambly v. Trott, 38, 39, 184.
 Hamilburgh v. Shepard, 353.
 Hamilton v. Eno, 313, 316.
 v. Home Fire Ins. Co., 170.
 v. Lomax, 96, 119, 268.
 v. Plainwell Water-Power Co., 14.
 v. Railroad Co., 55, 86, 104, 440.
 v. The William Branfoot, 240.
 Hamlin v. Abell, 331.
 v. Railway Co., 206, 231.
 Hammack v. White, 475, 482.
 Hammond v. Bussey, 212.
 v. Hightower, 259, 389.
 v. Hopkins, 346.
 v. Melton, 461.
 Hammond Co. v. Johnson, 506.
 Hampton v. Jones, 215, 219, 221.
 Hanaw v. Jackson Patriot Co., 301.
 Hancock v. Hubbell, 201.
 Handcock v. Baker, 389.
 Handlan v. McManus, 423.
 Handy v. Waldron, 336.
 Hanewacker v. Ferman, 234.
 Haney Manuf'g Co. v. Perkins, 59, 293, 295.
 Hankins v. New York, L. E. & W. R. Co., 523, 525.
 v. Watkins, 450, 487.
 Hanmer v. Wilsey, 386.
 Hanna v. Granger, 524.
 v. Jeffersonville Ry., 189.
 Hannam v. Mockett, 198.
 Hannem v. Pence, 457, 458.
 Hanover Water Co. v. Ashland Iron Co., 224.
 Hans v. Louisiana, 71.
 Hanson v. Globe Newspaper Co., 151, 282, 288, 296.
 v. Tarbox, 406.
 Hardenbergh v. St. Paul, M. & M. R. Co., 239.
 Harding v. Bodman, 80.

[The figures refer to pages.]

- Harding v. Larned**, 96.
 v. Sandy, 390.
 v. Weld, 96.
Hardy v. Ryle, 27.
Hare v. McIntire, 161, 476.
Hargreaves v. Deacon, 467.
 v. Kimberly, 224, 226.
Hargro v. Hodgdon, 437, 446.
Harley v. Buffalo Car Manuf'g Co.,
 506.
 v. Merrill Brick Co., 122.
Harman v. Tappenden, 104.
Harnett v. Maitland, 398.
Harold, The, 137.
Harper v. Luffkin, 267.
 v. Milwaukee, 106.
Harrell v. Kea, 191.
Harriman v. Railway Co., 151.
 v. Stowe, 165.
Harrington v. Ward, 80.
Harris v. Baker, 84.
 v. Gillingham, 393.
 v. James, 132.
 v. Rosenberg, 122.
 v. Tenney, 121.
Harrison v. Bush, 312.
 v. Manship, 302.
 v. Price, 239.
 v. Railroad Co., 524.
Harrower v. Ritson, 446.
Harseim v. Cohen, 99.
Hart v. Aldridge, 265.
 v. Baxter, 311.
 v. Board, 437.
 v. City of Albany, 427.
 v. Cole, 130.
 v. Evans, 448.
 v. Flynn, 244.
 v. Hudson River Bridge Co., 487.
 v. Pennsylvania R. Co., 174.
 v. U. S., 69.
Hartfield v. Roper, 500.
Hartford v. Brady, 390.
Hartleib v. McLane's Adm'r, 82.
Hartman v. Greenhow, 70.
Hartwell v. Kelly, 390.
Harvey v. Dunlop, 31, 63, 256.
 v. Harvey, 389.
 v. Mayne, 260.
 v. New York Cent. & H. R. R. Co.,
 508.
 v. Terre Haute & I. R. Co., 175.
Harvey v. Young, 336, 337.
Harwood v. Tompkins, 33.
Haskins v. Lumsden, 322.
 v. Royster, 263, 364, 371.
Hassenyer v. Railroad Co., 464.
Hastings v. Lusk, 311.
Hasty v. Sears, 522.
Hatch v. Donnell, 382, 383.
 v. Fuller, 233, 272.
 v. Vermont Cent. R. Co., 55, 86.
Hatchard v. Mege, 183, 325.
Hathaway v. Illinois Cent. Ry. Co.,
 524.
Hathorne v. Stinson, 204.
Hatt v. Evening News Ass'n, 294.
 v. Nay, 529.
Hatton v. Holmes, 83.
Hauck v. Tidewater Pipe-Line Co.,
 425, 431, 441.
Haugh's Appeal, 430.
Haven v. Foster, 338.
 v. Neal, 335.
Havens v. Railroad Co., 464.
Haverly v. State Line & S. R. Co.,
 212.
Haverstick v. Sipe, 422.
Hawes v. Knowles, 235.
Hawk v. Evans, 311.
 v. Ridgway, 237, 246.
 v. Thorn, 20.
Hawkesley v. Bradshaw, 307.
Hawkeye Lumber Co. v. Diddy, 81.
Hawkins v. Appleby, 414.
 v. Manston, 246.
 v. Railroad Co., 523.
 v. Taylor, 81.
Hawley v. Butler, 250.
Hawn v. Banghart, 270-272.
Hawver v. Whalen, 133, 137.
Hay v. Cohoes Co., 165, 431.
 v. Reid, 316, 321.
 v. Weber, 422, 437, 447.
Hayatt v. Trustees of Village of Rond-
 out, 218.
Haycraft v. Creasy, 32, 94, 331, 341.
Hayden v. Woods, 128.
Hayes v. Ball, 296.
 v. Railroad Co., 475, 476, 478, 480,
 482.
 v. Press Co., 314.
Hayman v. Governors of Rugby
 School, 90.

[The figures refer to pages.]

- Hayn v. Culliford, 20.
 Hayner v. Cowden, 301.
 Haynes v. Erk, 510.
 v. Gas Co., 462.
 v. Nowlin, 278.
 v. State, 258.
 v. Thomas, 25.
 Hays v. Blizzard, 353.
 v. People, 252.
 Hazard v. Harding, 361.
 v. Israel, 85.
 Hazelton v. Week, 33, 379, 393.
 Head v. Briscoe, 126.
 v. Porter, 69.
 Heald v. Carey, 413.
 Heaven v. Pender, 471, 472.
 Heckle v. Lurvey, 126.
 Hedges v. Tagg, 267.
 Heeg v. Licht, 420, 431, 456, 459.
 Heermance v. James, 276.
 Hefferen v. Northern Pac. R. Co., 530.
 Hefley v. Baker, 236.
 Hegerich v. Keddle, 186, 188.
 Heidenheimer v. Loring, 40.
 Helgel v. Wichita Co., 108.
 Heizer v. Kingsland & Douglass
 Manuf'g Co., 473.
 Hellams v. Switzer, 442.
 Helmke v. Stetler, 509.
 Helton v. Railway Co., 64.
 Hembling v. City of Grand Rapids, 463.
 Heminway v. Heminway, 259.
 Henderson v. Henshall, 337.
 v. McReynolds, 240.
 v. Midland Ry. Co., 102.
 v. Railroad Co., 241.
 v. St. Paul & D. Ry. Co., 240.
 v. Smith, 83.
 Hendriks v. Montagu, 324.
 Henke v. McCord, 77.
 Henkes v. City of Minneapolis, 218.
 Henkle v. Schaub, 59, 293.
 Henly v. Mayor, etc., of Lyme, 6, 60.
 Hennessey v. City of New Bedford,
 106.
 Henry v. Bridge Co., 87.
 v. Klopfer, 280, 465.
 v. Railroad Co., 14.
 v. Trustees, 446.
 Henshaw v. Noble, 165.
 Hepburn v. City of Philadelphia, 187.
 Hepfel v. St. Paul, M. & M. Ry. Co.,
 116.
 Herbert v. Rainey, 448.
 Hergenrather v. Spielman, 353.
 Heriot's Hospital v. Ross, 77.
 Hern v. Nichols, 144.
 Herne v. Bembow, 398.
 Herr v. City of Lebanon, 48.
 Herreshoff v. Tripp, 190.
 Herrick v. Gary, 461.
 v. Minneapolis & St. L. R. Co.,
 64, 531.
 Herring v. Boyle, 245.
 Herron v. Hughes, 32, 365.
 Hersey v. Chapin, 384.
 Hershey v. O'Neill, 150.
 Hertzog v. Hertzog, 15.
 Herzog v. Graham, 360.
 Hewett v. Swift, 145, 146.
 Hewey v. Nourse, 459.
 Hewitt v. Newburger, 244, 247, 249.
 v. Pioneer Press Co., 321.
 v. Prime, 272.
 Hewlett v. George, 252, 274.
 Hexamer v. Webb, 135.
 Hexter v. Bast, 332.
 Heyler v. New York News Co., 304.
 Heywood v. Tillson, 32, 371, 372.
 Hibbard v. Ryan, 351.
 v. W. U. Tel. Co., 53, 201.
 Hibbard, Spencer, Bartlett & Co. v.
 Ryan, 310.
 Hickey v. Morrell, 336.
 v. Railroad Co., 445.
 v. Taaffe, 509.
 Hicks v. Dorn, 445.
 v. Faulkner, 355.
 v. Foster, 230.
 v. Stevens, 346.
 Higgins, In re, 368, 375.
 v. Butcher, 184.
 v. Dewey, 220, 459.
 v. McCabe, 475.
 v. Minaghan, 258.
 v. Whitney, 409.
 Higginson v. York, 379.
 Higham v. Vanosdol, 276, 277.
 Hilbery v. Hatton, 33.
 Hill v. Boston, 107, 109.
 v. Boston, H. T. & W. R. Co., 174.
 v. City of Charlotte, 106.

[The figures refer to pages.]

- Hill v. City of New York**, 440.
 v. Davis, 20.
 v. Durham House-Drainage Co., 313, 319.
 v. Goodchild, 123.
 v. Gray, 334.
 v. Miles, 311.
 v. Morey, 152.
 v. Perrott, 20.
 v. Pride, 76.
 v. Taylor, 244, 245, 252.
 v. U. S., 70.
 v. Ward, 325.
 v. Winsor, 220.
- Hillard v. Richardson**, 135.
Hilliard v. Goold, 260.
Hills v. Snell, 407.
Hilmes v. Stroebel, 122.
Hilton v. Eckersley, 369.
Hinchman v. Paterson Horse R. Co., 55, 439.
 v. Weeks, 342.
Hinckley v. Emerson, 92.
 v. Krug, 487.
Hinds v. Harbou, 161.
 v. Overacker, 161.
Hines v. New York Cent. & H. R. R. Co., 479.
Hinkle v. Railway Co., 178, 179.
Hinks v. Hinks, 383.
Hintz v. Graupner, 306, 323.
Hjort v. Bott, 379, 403, 408.
Hitch v. Lambright, 74.
Hitchcock v. Burgett, 492.
Hoadley v. Transportation Co., 48, 220.
Hoag v. Railroad Co., 44, 212.
Hoard v. Peck, 50, 277.
Hobart v. Hagget, 379.
Hobbs v. Electric Light Co., 178.
 v. Railroad Co., 212, 219.
 v. Ray, 248.
Hobson v. New Mexico & A. R. Co., 493.
 v. Perry, 92.
 v. Thellusson, 203.
Hodges v. Bales, 270.
 v. Weltberger, 29.
Hodgson v. Scarlett, 310.
Hodsman v. Grissel, 97.
Hodsoll v. Stallebrass, 27.
Hoffman v. Carow, 415.
 v. Harrington, 395.
- Hoffman v. Kemerer**, 272.
 v. Livingston, 43.
 v. New York Cent. & H. R. R. Co., 150.
 v. Water Co., 403.
Hofnagle v. New York Cent. & H. R. R. Co., 524.
Hogan v. Central Pac. R. Co., 446.
 v. Northern Pac. R. Co., 518.
Hogg v. Ward, 250, 251.
Hogle v. New York Cent. & H. R. R. Co., 492.
Holbrook v. Connor, 335.
 v. Railway Co., 484.
 v. Wight, 411.
Holcomb v. Noble, 332.
Holden v. Merritt, 354.
Holdom v. Ayer, 330, 343, 344.
Hole v. Barlow, 433.
 v. Sittingbourne & S. R. Co., 137.
Holland v. Bartch, 461.
Hollenbeck v. Winnebago, 109.
Holley v. Mix, 250, 251, 361, 362.
Holliday v. Parish of St. Leonard, 84, 110.
Hollins v. Fowler, 7, 30, 379, 407, 415.
Hollis v. Harris, 37.
 v. Meux, 310, 311.
Holmes v. Blyler, 249, 252.
 v. Corthell, 427.
 v. Doane, 383.
 v. Horger, 357.
 v. Jones, 306.
 v. Mather, 15, 31, 63, 283, 499.
 v. Wilson, 228, 381.
Holst v. Stewart, 330, 345.
Holston v. Boyle, 308.
Holt v. Scholefield, 298.
Holton v. Noble, 338.
Holtz v. Dick, 277.
Holum v. Chicago, M. & St. P. Ry. Co., 507.
Homer v. Battyn, 246.
 v. Engelhardt, 301.
 v. Thwing, 96, 98.
Honey v. Chicago, B. & Q. Ry. Co., 499.
Honsee v. Hammond, 204.
Hood v. Blair, 81.
 v. Sudderth, 270.
Hooker v. Miller, 115.
 v. Newton, 237.

[The figures refer to pages.]

- Hoosac Tunnel Co. v. O'Brien, 74.
 Hoots v. Graham, 395.
 Hopf v. Baking Co., 170.
 Hopkins v. Baltimore & P. R. Co., 443.
 v. Crowe, 246.
 Hopner v. McGowan, 245.
 Hopper v. Reeve, 255, 257.
 Hopwood v. Thorn, 291.
 Horbach v. Marsh, 191.
 Horgan v. Pacific Mills, 177.
 Horn v. Baltimore & O. R. Co., 480.
 Horne v. Pudil, 78.
 Horner v. Lawrence, 167.
 v. Marshall, 95.
 v. Stillwell, 441.
 v. Wood, 209.
 Hornketh v. Barr, 14.
 Horn's Adm'r v. Baltimore & O. R. Co., 485.
 Horsfall v. Thomas, 342.
 Horton v. City of Taunton, 218.
 v. Hendershot, 385.
 v. Newell, 108.
 v. New York Cent. & H. R. R. Co., 182.
 Hosner v. De Young, 71.
 Hotchkin v. Third Nat. Bank, 334.
 Hough v. Railroad Co., 485, 518, 519, 521.
 Houghkirk v. President, etc., 241.
 Houlden v. Smith, 77, 310.
 Houldsworth v. City of Glasgow Bank, 104.
 Hounsell v. Smyth, 467, 468.
 House v. Board, 109.
 v. Meyer, 485.
 Houseman v. Association, 82.
 Houston v. Brush, 483, 511, 512.
 v. Musgrove, 182.
 Houston & G. N. R. Co. v. Meador, 142.
 Houston & T. C. Ry. Co. v. Tierney, 177.
 Howard v. City of Worcester, 107.
 v. Hood, 524.
 Howe v. Cook, 15.
 Howell v. Goodrich, 222.
 Hower v. Ulrich, 41, 158.
 Howk v. Minnick, 8.
 Howland v. Day, 258.
 Howland v. George F. Blake Manuf'g Co., 117, 286, 317, 318.
 v. Inhabitants of Maynard, 107.
 v. Vincent, 115.
 Hoyer v. Bush, 249.
 Hoyt v. Gelston, 386.
 v. Jeffers, 46.
 Hubbard v. Railroad Co., 466.
 v. Switzer, 85.
 v. Town of Mason City, 100.
 Huchting v. Engel, 96, 97.
 Huckle v. Money, 239.
 Huddleston v. Johnson, 400.
 v. West Bellevue, 123.
 Hudkins v. Haskins, 119.
 Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 430, 462.
 Huerzeler v. Central Cross Town R. Co., 503.
 Huey v. Gahlenbeck, 484.
 Huff v. Ames, 464.
 v. Watkins, 265.
 Huffman v. Huglett, 196.
 Hughes v. Anderson, 427.
 v. Baltimore & O. R. Co., 508.
 v. Coors, 411.
 v. Helser, 437.
 v. Stevens, 381.
 Huling v. Henderson, 378, 392.
 v. Huling, 277, 278.
 Hull v. Bartlett, 260.
 Hulse v. Brantley, 386.
 v. Tollman, 258.
 Hume v. Oldacre, 122.
 Humes v. Proctor, 241.
 Humphrey v. Douglass, 97.
 v. Merriam, 329, 344.
 Humphreys v. Mears, 84.
 v. Stanfeld, 302.
 Humphries v. Brogden, 422, 423.
 Hungerford v. Chicago, M. & St. P. Ry. Co., 517.
 Hunnewell v. Duxbury, 339, 343.
 Hunt v. Bates, 193.
 v. D'Orval, 201, 206, 231.
 v. Great Northern Ry. Co., 319.
 v. Simonds, 32.
 Hunter v. Burlington, C. R. & N. R. Co., 190.
 v. Cronkhite, 404.
 v. Mathis, 75.

[The figures refer to pages.]

Huntoon v. Hazleton, 264.
 Hupfer v. Rosenfeld, 304.
 Hurd v. Fleming, 113.
 Hurdman v. Northeastern Ry. Co., 426.
 Hurley v. Jones, 379.
 Hurst v. Gwennap, 410.
 Huson v. Dale, 321.
 Hussey v. Coger, 525.
 v. King, 460.
 Hutcheson v. Peck, 276, 277.
 Hutchins v. Brackett, 84.
 v. Hutchins, 53, 328, 348, 364, 365.
 Hutchinson v. Horn, 268.
 v. Light Co., 450.
 v. Railroad Co., 475, 520.
 Huxley v. Berg, 215, 221, 234.
 Hyatt v. Adams, 184, 185, 279, 280.
 v. State, 70.
 v. Trustees of Village of Rondout, 218.
 Hyde v. Cooper, 41, 121.
 v. Graham, 393.
 Hyde Park v. Gay, 56, 91.
 Hyman v. Helm, 64.
 Hyne v. U. S., 71.

I

I. De S. v. W. De S., 59.
 Ihl v. Forty-Second St. & G. St. F. R. Co., 201.
 Illidge v. Goodwin, 152.
 Illinois Cent. Ry. Co. v. Allen, 117.
 v. Cox, 522.
 v. Cragin, 100, 486.
 v. Hammer, 235.
 v. Handy, 140.
 v. Latham, 150.
 v. Nowicki, 486.
 v. Whittemore, 261.
 Illinois River Paper Co. v. Albert, 512.
 Illinois & St. L. Railroad & Coal Co. v. Cobb, 381.
 v. Ogle, 234.
 Improvement Co. v. Munson, 481.
 Inchbald v. Robinson, 434.
 Independent Bldg. & Loan Ass'n v. Real Estate Title Co., 153.
 Indermaur v. Dames, 467, 468.
 Indiana, B. & W. R. Co. v. Eberle, 226.

Indiana Manuf'g Co. v. Millican, 187.
 Indianapolis, B. & W. R. Co. v. Birney, 219.
 Indianapolis Journal Newspaper Co. v. Pugh, 294.
 Indianapolis, P. & C. R. Co. v. Pitzer, 115, 210.
 Indianapolis Union Ry. Co. v. Boettcher, 452.
 Indianapolis & C. R. Co. v. Caldwell, 25.
 Indianapolis & St. L. R. Co. v. Stables, 231, 232.
 Ingalls v. Bulkley, 412.
 v. Miller, 346.
 Ingersoll v. Jones, 268, 272.
 Ingwersen v. Rankin, 131, 443.
 Inhabitants of Township of Raritan v. Port Reading R. Co., 446.
 Inhabitants of Westfield v. Mayo, 162.
 Inland & Seaboard Coasting Co. v. Tolson, 494.
 Innes v. Wylie, 90.
 Innis v. Railway Co., 437.
 Insurance Co. v. Tweed, 46.
 International & G. N. Ry. Co. v. Greenwood, 371.
 v. Hinzle, 177.
 v. Miller, 141.
 v. Smith, 236.
 v. Thornton, 176.

Ireland v. Elliott, 262.
 v. McGarvish, 301.
 Irion v. Lewis, 73.
 Iron Mountain R. Co. v. Bingham, 55, 86.
 Irvine v. Wood, 123, 428.
 Irwin v. Dearman, 269.
 Isaacs v. Third Ave. R. Co., 103.
 Isack v. Clarke, 405.
 Isbell v. New York & N. H. R. Co., 116.
 Ives v. Humphreys, 206, 231.
 Iveson v. Moore, 60, 437.

J

Jackson v. Allen, 338.
 v. Brownson, 399.
 v. Hall, 215, 221.
 v. Hopperton, 306.

[The figures refer to pages.]

- Jackson v. King**, 94.
 v. Kirby, 126.
 v. Phillips, 112.
 v. Pittsburgh Times, 315.
 v. Railroad Co., 210.
 v. St. Louis, I. M. & S. Ry. Co., 187.
 v. Second Ave. R. Co., 102.
 v. Smithson, 461.
 v. Stanfield, 371, 376.
 v. Telegraph Co., 455.
 v. Town of Bellevue, 218.
Jackson & Sharp Co. v. Philadelphia, W. & B. R. Co., 394.
Jacksonville Journal Co. v. Beymer, 289, 299.
Jacksonville, T. & K. W. Ry. Co. v. Garrison, 238.
Jacobs v. Frederick, 191.
 v. Hoover, 256, 262.
Jacobs' Case, 496.
Jacoby v. Laussatt, 411.
Jaffray v. Davis, 178.
Jager v. Adams, 458.
James v. Campbell, 34.
 v. Christy, 185.
 v. Hayward, 428.
 v. James, 48.
 v. Rutledge, 288.
Janesville v. Milwaukee & M. R. Co., 88.
J'Anson v. Stuart, 59, 294.
Jarman v. Chicago & G. T. Ry. Co., 526.
Jay v. Almy, 56.
Jefferies v. Duncombe, 283.
Jeffersonville, M. & I. R. Co. v. Esterle, 226.
 v. Riley, 46, 208.
Jeffersonville Ry. Co. v. Rogers, 104.
Jeffrey v. Bigelow, 216.
Jeffries v. Great Western Ry. Co., 405.
 v. McNamara, 248.
Jeffs v. Railway Co., 47.
Jencks v. Kenny, 423.
Jenings v. Florence, 361.
Jenkins v. Fowler, 24, 29, 32, 371, 432.
 v. French, 184.
 v. Turner, 460.
Jenks v. Williams, 33, 422, 428, 432.
Jenney Electric Light & Power Co. v. Murphy, 514.
Jennings v. Thompson, 248.
Jenoure v. Delmege, 306, 313.
Jerom & Knight's Case, 79.
Jewell v. Colby, 94.
 v. Grand Trunk Ry., 210.
Jewett v. Carter, 153.
 v. Whitney, 53, 201.
Johns v. Press Pub. Co., 313.
Johnson v. Barber, 151.
 v. Boston Towboat Co., 525.
 v. Bouton, 244, 300.
 v. Carrere, 40.
 v. Davis, 366.
 v. Drummond, 221.
 v. Farr, 407, 410.
 v. Girdwood, 118, 356.
 v. Hitchcock, 325.
 v. Hovey, 514.
 v. Lindsay, 521.
 v. Merry Mount Granite Co., 177.
 v. Miller, 357, 366.
 v. Minneapolis & St. L. Ry. Co., 116.
 v. Missouri Pac. Ry. Co., 114.
 v. Morton, 248.
 v. Netherlands Am. Steam Nav. Co., 521.
 v. Patterson, 92.
 v. People, 437.
 v. Philadelphia & R. R. Co., 15, 22.
 v. Pie, 99.
 v. Pye, 97, 99.
 v. Reed, 353, 361.
 v. Richardson, 470.
 v. Skillman, 393, 394.
 v. Smith, 236.
 v. Spear, 521.
 v. State, 56, 253.
 v. Town of Irasburgh, 114.
Johnson's Adm'rs v. Richmond & D. R. Co., 173.
Johnson's Case, 71.
Johnston v. Disbrow, 272, 276, 279.
 v. District of Columbia, 75.
 v. Ott, 138.
Johnstone v. Sutton, 349, 360.
John W. Lovell Co. v. Houghton, 317.
Joliet Steel Co. v. Shields, 507.
Jolliffe v. Baker, 331.
Jolly v. Single, 216.
Jones v. Andover, 113.
 v. Association, 153.

[The figures refer to pages.]

Jones v. Baker, 32.
 v. Blocker, 363.
 v. Boyce, 46.
 v. Brown, 74, 75.
 v. Chapman, 388.
 v. Chappell, 398, 442.
 v. Fay, 464.
 v. Fortune, 259.
 v. Gale, 119.
 v. Gilmore, 48.
 v. Greeley, 295.
 v. Gwynn, 350.
 v. Hannovan, 53, 201.
 v. Hart, 144.
 v. Herne, 299.
 v. Herron, 388.
 v. Housatonic R. Co., 428.
 v. Kellogg, 410.
 v. Lamon, 82.
 v. Matthews, 236.
 v. Railroad Co., 55, 87, 459.
 v. St. Louis R. Co., 55, 86.
 v. Stanly, 363.
 v. Werden, 77.
 v. Williams, 444, 445.
Jordan v. Hanson, 77.
 v. Pickett, 344.
 v. Siefert, 182.
Jordin v. Crump, 117.
Jordon v. Hayne, 79.
Joseph v. Henderson, 384.
Joseph Schlitz Brewing Co. v. Comp-
 ton, 226.
Josselyn v. McAllister, 164, 250.
Joy v. Bitzer, 216.
Joyce v. Martin, 131, 132.
 v. Parkhurst, 251.
Joyner v. Roberts, 83.
J. S. Keator Lumber Co. v. St. Croix
 Boom Corp., 55, 86.
Juchter v. Boehm, 361.
Judson v. Cook, 40.
 v. Reardon, 249.
Jung v. Neraz, 429.
Jutte v. Bridge Co., 466.

K

Kaare v. Troy Steel & Iron Co., 517.
Kahl v. Love, 80.
Kalckoff v. Zoehrlaut, 409.

Kalembach v. Michigan Cent. R. Co.,
 240.
Kane v. Hutchisson, 411.
Kankakee El. R. Co. v. Whittemore,
 462.
Kansas City, Ft. S. & M. R. Co. v.
 Kirksey, 476.
Kansas City, M. & B. R. Co. v. Cant-
 rell, 23.
 v. Sanders, 102, 103.
Kansas Pac. Ry. Co. v. Muhlman, 66,
 225, 227, 228.
 v. Peavey, 173.
Kavanagh v. Barber, 443.
Kavanaugh v. Janesville, 280.
Kay v. Fredrigal, 310.
 v. Jansen, 283.
Keane v. Boycott, 265.
Kearney v. Clutton, 415.
 v. Fitzgerald, 100.
 v. Railway Co., 484.
Keates v. Earl of Cadogan, 335, 336.
Keating v. Springer, 422.
Keator Lumber Co. v. St. Croix Boom
 Corp., 86.
Keats v. Hugo, 422.
Keeble v. Hickeringill, 14, 371.
Keefe v. Chicago & N. W. Ry. Co.,
 491.
Keegan v. Hayden, 123.
Keeler v. Eastman, 401.
Keen v. Coleman, 127.
Keenan v. Cavanaugh, 209.
 v. Southworth, 84.
Keene v. Tribune Ass'n, 301.
Keenholts v. Becker, 223.
Keep v. Quallman, 258.
Keffe v. Railroad Co., 455.
Kehrig v. Peters, 146.
Keith v. Howard, 80.
Keller v. Donnelly, 267.
Kelley v. Central R. Co., 241.
 v. Kelley, 239.
 v. Mayberry Tp., 280.
 v. Norcross, 526.
 v. Town of Fond du Lac, 218.
Kellogg v. Chicago & N. W. R. Co.,
 46.
Kelly v. Chicago, M. & St. P. Ry.
 Co., 376.
 v. Johnson, 521.
 v. Rogers, 230.

[The figures refer to pages.]

- Kelsey v. Griswold, 190.
 Kemp v. Neville, 73.
 v. Seely, 386.
 Kendall v. Drake, 257.
 v. Stone, 324-326.
 v. U. S., 80.
 Kennedy v. Burrier, 189.
 v. McCain, 162.
 v. McKay, 153.
 v. Shea, 267, 270.
 v. Spring, 524.
 v. Sugar Refinery, 233.
 Kenney v. Ranney, 408.
 Kennon v. Gilmer, 233.
 Kenny v. Collier, 201.
 Kent v. Cole, 260.
 Kentucky Cent. R. Co. v. Gastineau's
 Adm'r, 452.
 Kentucky Cent. Ry. Co. v. Smith, 496.
 Kenyon v. Woodruff, 193.
 Kern v. Myll, 443.
 Kerns v. Hagenbuchle, 272.
 Kerr v. Workman, 355.
 Kessler v. Letts, 432.
 Kester v. W. U. Tel. Co., 232, 233.
 Ketcham v. Newman, 137, 141, 394.
 Keyes v. Railway Co., 234.
 Keyworth v. Hill, 126, 414.
 Kidd v. Ward, 289.
 Kidney v. Stoddard, 335.
 Kiene v. Ruff, 59, 286.
 Kiff v. Youmans, 32, 259, 262.
 Kilbourn v. Thompson, 73, 240.
 Kimball v. Bates, 355.
 v. Harman, 32, 366.
 Kimber v. Press Ass'n, 314.
 Kimberly & Clark Co. v. Hewitt, 424.
 Kimel v. Kimel, 434.
 Kincaid v. Hardin Co., 108.
 King v. Hoare, 193.
 v. Johnston, 244, 350, 362.
 v. Jones, 365.
 v. Miller, 401.
 v. Patterson, 317.
 v. Richards, 60.
 v. Spurr, 139.
 v. Watson, 104.
 Kingsbury v. Bradstreet Co., 318.
 Kingston v. Booth, 143.
 Kinney v. Railway Co., 172.
 Kircher v. Murray, 380.
 Kirchner v. New Home Sewing Mach.
 Co., 179.
 Kirk v. Gregory, 379, 383.
 v. Todd, 183.
 v. Village of Homer, 463.
 Kirkman v. Phillips' Heir, 196.
 Kirkpatrick v. Eagle Lodge, 317.
 Kirkwood v. Finegan, 432.
 Kirtley v. Railway Co., 114.
 Kissecker v. Monn, 393.
 Kitchen v. Campbell, 180.
 v. Greenabaum, 113.
 v. McCloskey, 387.
 Klauder v. McGrath, 123.
 Klinck v. Colby, 313, 318.
 Klopfer v. Bromme, 272.
 Klumph v. Dunn, 323.
 Knapp v. Roche, 193.
 Knappen v. Freeman, 120.
 Knell v. Briscoe, 73.
 Knickerbacker v. Colver, 194.
 Knight v. Abert, 115.
 v. Fox, 140.
 v. International & G. N. Ry. Co.,
 249.
 v. Legh, 384.
 v. Luce, 164.
 v. Nelson, 193.
 v. Sackett & Wilhelms Lith. Co.,
 406.
 v. Wilcox, 265, 267, 271.
 Knights v. Quarles, 184.
 Knott v. Wagner, 33, 477.
 Knowlton v. Bartlett, 85.
 v. Holt, 134.
 Knox v. Flack, 97.
 Knoxville, C. G. & L. R. Co. v. Acuff,
 178.
 Knupfle v. Knickerbocker Ice Co., 478.
 Koch v. Branch, 416.
 Koelsch v. Philadelphia Co., 49.
 Kohlsaat v. Crate, 351.
 Kohn v. McNulta, 517.
 Kollock v. City of Madison, 105, 137.
 Koons v. Railroad Co., 511.
 Korte v. St. Paul Trust Co., 88.
 Kosminsky v. Goldberg, 128.
 Kowing v. Manly, 126, 127.
 Kramer v. Lott, 350.
 Kranz v. Long Island Ry. Co., 166.
 Krause v. Splegel, 350.

[The figures refer to pages.]

Krebs v. Thomas, 244.
 Kreger v. Osborn, 41, 260.
 v. Township of Bismarck, 108.
 Kreider v. Lancaster, E. & M. Turn-
 pike Co., 110, 491.
 Krelser v. Scofield, 243.
 Kreiter v. Nichols, 146.
 Kress v. State, 73.
 Kreuziger v. Chicago & N. W. R. Co.,
 46.
 Kriesel v. Eddy, 82.
 Kroessin v. Keller, 278.
 Krom v. Schoonmaker, 94, 95.
 Krug v. St. Mary's Borough, 88, 108.
 v. Ward, 360.
 Krulevitz v. Eastern R. Co., 102.
 Krum v. Anthony, 492.
 Kuehn v. City of Milwaukee, 438.
 Kuhn v. Jewett, 46.
 Kujek v. Goldman, 275.

L

Lacy v. Pixler, 100.
 Ladd v. New Bedford Ry. Co., 512.
 Laffin v. Willard, 200, 203.
 Laffin & Rand Powder Co. v. Tearney,
 420, 431.
 Lafone v. Smith, 307.
 Laing v. Nelson, 295, 307, 386.
 Lake Erie & W. R. Co. v. Mugg, 515.
 Lake Shore & M. S. R. Co. v. Bode-
 mer, 451, 489.
 v. Frantz, 231.
 v. Lavalley, 508.
 v. McIntosh, 48, 499.
 v. Miller, 499.
 v. Prentice, 104, 115, 150, 235.
 Lake Superior Iron Co. v. Erickson,
 522.
 Lally v. Cantwell, 363.
 Lalor v. Chicago, B. & Q. R. Co., 518,
 519, 520.
 Lamb v. Stone, 50.
 v. Walker, 27.
 Lambert v. Alcorn, 427.
 v. Bessey, 29.
 v. Stroother, 380.
 Lamborn v. Watson, 141.
 Lamm v. Port Deposit Homestead
 Ass'n, 141, 142.
 Lamming v. Galusha, 62, 420, 431.

Lampet v. Starkey, 392.
 Lamphear v. Buckingham, 188.
 Lancaster Ave. Imp. Co. v. Rhodes,
 137.
 Landon v. Hutton, 178.
 Landrum v. Wells, 244.
 Lane v. Atlantic Works, 46, 49, 152,
 208, 219, 478.
 v. Black, 40.
 v. Cotton, 80, 84, 165, 167.
 Langdon v. Templeton, 386.
 Lange v. Benedict, 74, 77, 310, 362.
 v. Wagner, 216.
 Langford v. Boston & A. R. Co., 353.
 v. Owsley, 224, 225.
 v. U. S., 69.
 Langley v. Railroad Co., 137.
 Langridge v. Levy, 340, 472.
 Laning v. New York Cent. R. Co., 529.
 Lankins v. Terwilliger, 57.
 Lannen v. Albany Gaslight Co., 217,
 494.
 Lansing v. Stone, 31, 63, 482.
 La Pierre v. Chicago & G. T. Ry. Co.,
 506.
 Lapleine v. Steamship Co., 210.
 Lapsley v. Railroad Co., 461.
 Larimer County Ditch Co. v. Zimmer-
 man, 485.
 Larios v. Gurety, 216, 219.
 La Riviere v. Pemberton, 497.
 Larkin v. Burlington, C. R. & N. Ry.
 Co., 498.
 Larmore v. Iron Co., 468.
 Larned v. Buffinton, 323.
 Larrabee v. Minnesota Tribune Co.,
 321.
 Larson v. Chase, 10.
 v. Furlong, 446.
 v. Metropolitan St. Ry. Co., 134.
 Lary v. Cleveland, C., C. & I. R. Co.,
 114, 115.
 Lasere v. Rochereau, 101.
 Lathers v. Wyman, 209.
 Latter v. Braddell, 118.
 Lattin v. Gillette, 190.
 Laubheim v. Steamship Co., 111.
 Lauzon v. Charroux, 350, 353.
 Lavery v. Snethen, 411.
 Lavery v. Crooke, 271, 272.
 Lawless v. Anglo-Egyptian Cotton &
 Oil Co., 102, 318.

[The figures refer to pages.]

- Lawrence v. Cleary**, 356.
 v. Investment Co., 37.
 v. Jenkins, 215.
 v. Rice, 200, 203.
 v. Shipman, 133.
 v. Spence, 271.
Lawson v. Buzines, 246.
 v. City of Seattle, 105.
 v. Price, 448.
 v. Truesdale, 514.
Lawton v. Steele, 440.
Leach v. Prebster, 25.
Leahey v. March, 357, 358.
Leame v. Bray, 29.
Learned v. Castle, 435.
Leary v. Boston & A. R. Co., 518.
Lebanon Light, Heat & Power Co. v. Leap, 137, 490.
Le Clair v. First Division St. Paul & P. R. Co., 505.
Le Clear v. Perkins, 357.
Lederman v. Pennsylvania R. Co., 462, 503.
Ledgerwood v. City of Webster, 106.
Ledig v. Brewing Co., 461.
Lee v. Bayes, 412.
 v. Hefley, 96.
 v. McKay, 413.
 v. Riley, 215.
 v. Town of Mound Station, 395.
 v. Troy Citizens' Gas Light Co., 485.
Lees v. Philadelphia & R. R. Co., 479.
Leete v. Pilgrim Congregational Soc., 435.
Le Fanu v. Malcomson, 288.
Leggott v. Great Northern R. Co., 184, 188.
Leigh v. Jack, 387.
Leighton v. Sargent, 474.
Leland v. Goodfellow, 346.
Lemon v. Pullman Palace Car Co., 140.
Leonard v. Tidd, 416.
Leslie v. Pounds, 131.
Lester v. Town of Pittsford, 486.
Lettis v. Horning, 461.
Leucker v. Stelleu, 271, 272.
Leuthold v. Fairchild, 165.
Levi v. Brooks, 145.
 v. Milne, 288.
Leward v. Basely, 258.
Lewis, Ex parte, 396.
 v. Few, 314.
 v. Flint & P. M. Ry. Co., 215.
 v. Great Western Ry. Co., 175.
 v. Hoover, 254.
 v. Jewell, 342.
 v. Littlefield, 96.
 v. Ocean Nav. & Pier Co., 407.
 v. Read, 41.
 v. State, 70.
 v. Walter, 322.
Lewton v. Hower, 356.
Leyenberger v. Paul, 356.
Lexington & O. Ry. Co. v. Kidd, 404.
Libby v. Berry, 275.
 v. Railroad Co., 455.
Libby, McNeill & Libby v. Scherman, 524.
Liebstadter v. Federgreen, 255, 259.
Lightly v. Clouston, 20.
Lilley v. Roney, 310.
Limpus v. London General Omnibus Co., 146.
Lincoln v. Buckmaster, 451.
 v. City of Boston, 106.
 v. City of Detroit, 431.
 v. Hapgood, 83.
 v. Judd, 191.
Lind v. Beck, 479.
Lindholm v. City of St. Paul, 463.
Lindon v. Hooper, 20.
Lindsay Petroleum Co. v. Hurd, 336.
Lindvall v. Woods, 182.
Linington v. Strong, 345.
Linnehan v. Rollins, 134, 139.
Lipe v. Blackwelder, 92.
 v. Eisenlerd, 267.
Litchfield v. Hutchinson, 330, 332.
Litchfield Coal Co. v. Taylor, 478.
Little v. Boston & M. R. R., 209.
 v. Hackett, 498.
 v. Stanback, 59.
Littlehale v. Osgood, 47.
Little's Case, 490.
Little Schuylkill, N. R. & C. Co. v. Richards' Adm'r, 122, 195.
Littlewood v. Mayor, etc., 186.
Livermore v. Batchelder, 92, 93.
 v. Herschell, 366.
Livezey v. Philadelphia, 49.
 v. Schmidt, 426.
Livingston v. Adams, 457.

[The figures refer to pages.]

Livingston v. Bishop, 193-195.
 v. Borroughs, 252.
 v. Cox, 20, 48.
 v. McDonald, 426.
 v. Reynolds, 399.
 v. Tanner, 384.
 v. Webster, 395.
 Lobdell v. Baker, 334.
 v. Stowell, 414.
 Loberg v. Town of Amherst, 463.
 Lock v. Ashton, 247.
 Locke v. Bradstreet Co., 318.
 v. State, 70.
 Lockett v. Ft. Worth & R. G. Ry. Co.,
 442.
 Lockwood v. Bartlett, 414.
 Loeschman v. Machin, 406.
 Loewenberg v. Rosenthal, 379.
 Loewer v. Harris, 335, 348.
 Loftus v. Inhabitants of North Adams,
 494.
 Logan v. Austin, 119.
 Loibl v. Breidenbach, 282.
 Loker v. Damon, 492.
 Lomerson v. Johnston, 333.
 Londegan v. Hammer, 74.
 London & County Banking Co. v. Lon-
 don & River Plate Bank, 381.
 London & N. W. R. Co. v. Bradley, 88.
 Long v. Buchanan, 394.
 v. Clapp, 216.
 v. Minneapolis, 6.
 v. Township of Milford, 496.
 v. Warren, 343.
 v. Woodman, 336, 338.
 Longendyke v. Longendyke, 275.
 Look v. Choate, 250.
 v. Dean, 251.
 Loomis v. Deets, 272.
 Loop v. Litchfield, 473.
 Lord v. Manufacturing Co., 225.
 v. Tiffany, 194.
 Lord Cromwell's Case, 289.
 Lords Bailiff-Jurats of Romney
 Marsh v. Trinity House Corp., 46,
 47, 49.
 Lorentz v. Robinson, 522.
 Lorimer v. St. Paul City Ry. Co., 506.
 Loring v. Mulcahy, 416.
 Losee v. Buchanan, 30, 63, 89, 457,
 459, 473.
 v. Clute, 472, 473.

Lothrop v. Adams, 102, 321.
 Loubat v. Leroy, 90.
 Loughran v. City of Des Moines, 444.
 Louisiana v. Mayor, etc., of New Or-
 leans, 16.
 Louisville, C. & L. R. Co. v. Sullivan,
 115.
 Louisville, E. & St. L. C. R. Co. v. Al-
 len, 515.
 Louisville, E. & St. L. R. Co. v.
 Clarke, 189.
 Louisville Gas Co. v. Gutenkuntz, 217.
 Louisville, N. A. & C. R. Co. v. Davis,
 48.
 v. Falvey, 210.
 v. Jones, 210.
 v. Lucas, 221.
 v. Red, 493.
 v. Shanks, 502.
 v. Snyder, 211.
 v. Wood, 210.
 Louisville, N. O. & T. R. Co. v. Hirsh,
 500.
 Louisville Safety-Vault & Trust Co.
 v. Louisville & N. R. Co., 451.
 Louisville & N. R. Co. v. Brooks'
 Adm'x, 237.
 v. Davis, 508.
 v. East Tennessee, V. & G. Ry.
 Co., 112.
 v. Greer, 235.
 v. Hurt, 452.
 v. Kellem's Adm'x, 116.
 v. Kelly, 512.
 v. McCoy, 451.
 v. Mitchell, 461.
 v. Northington, 210.
 v. Orr, 173, 509.
 v. Owen, 174, 175.
 v. Shivell's Adm'r, 520.
 v. Sowell, 174.
 v. Williams, 506.
 v. Wynn, 174.
 Lovejoy v. Murray, 123, 193, 409.
 Low v. Elwell, 395.
 Lowe v. Wartman, 353.
 Lowell v. Wyman, 106.
 Lowenstein v. Chappell, 209.
 v. Monroe, 219.
 Lowery v. Railway Co., 220.
 Loweth v. Smith, 228.
 Lowry v. Vedder, 300, 318.

[The figures refer to pages.]

Loyd v. City of Columbus, 107.
 Lucas v. Michigan Cent. R. Co., 235.
 Luce v. Insurance Co., 220.
 Luck v. Zapp, 82.
 Lucke v. Assembly, 371.
 Luddington v. Peck, 352.
 Ludgater v. Love, 141.
 Lueck v. Heisler, 234, 350, 355, 357, 360.
 Lufkin v. Zane, 132.
 Luke v. Calhoun Co., 188.
 Lumby v. Allday, 291, 300.
 Lumley v. Gye, 33, 263, 264, 362-364, 371.
 Lund v. City of New Bedford, 202.
 v. Tyngsboro, 46.
 Lunsford v. Dietrich, 355.
 Lunt v. Brown, 384.
 v. Philbrick, 119.
 Luse v. Jones, 206, 231.
 v. Oaks, 128.
 Lutterell v. Reynell, 8.
 Lyde v. Barnard, 19.
 Lydian Monarch, The, 175.
 Lyle v. Clason, 285.
 Lyman v. Edgerton, 83.
 Lynch v. Allyn, 509.
 v. Knight, 232, 278, 291, 292.
 v. McNally, 490.
 v. Metropolitan St. Ry. Co., 502.
 v. Railroad Co., 102, 160, 244, 245.
 Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 217.
 Lyon v. Fairbank, 395.
 Lyons v. Martin, 144.
 v. Merrick, 215.

M

McAdoo v. Railroad Co., 453.
 McAfee v. Crofford, 215.
 McAleer v. Horsey, 345.
 McAllaster v. Bailey, 82.
 McAllister v. Detroit Free Press Co., 286, 297, 314.
 McAneany v. Jewett, 52.
 McArthur v. Green Bay & Mississippi Canal Co., 114.
 v. Sears, 49.
 McAunich v. Mississippi & M. R. Co., 531.
 McAvoy v. Wright, 123.

McCabe v. Brown, 37.
 McCafferty v. Railway Co., 133.
 McCaffrey v. Railroad Co., 461.
 McCaffrey's Appeal, 433.
 McCall v. Cohen, 77.
 v. Forsyth, 21.
 McCallum v. Lambie, 287.
 McCann v. Wolff, 33.
 McCaraher v. Com., 82.
 McCarn v. International & G. N. R. Co., 176.
 McCarthey v. City of Syracuse, 136.
 McCarthy v. Boston & L. R. Corp., 266.
 v. De Armit, 250.
 v. Guild, 264.
 McCarty v. Gulf, C. & S. F. Ry. Co., 175.
 McCauley v. Norcross, 531.
 McCawley v. Railway Co., 172.
 McClellan v. St. Paul, M. & M. Ry. Co., 48, 386.
 v. Scott, 333, 337, 346.
 McClure v. Miller, 269.
 McComble v. Davies, 404, 410, 415.
 McConnel v. Kibbe, 201.
 McConnell v. Bostelmann, 428.
 v. Ory, 324.
 McCord v. W. U. Tel. Co., 154.
 McCormick v. Pennsylvania Cent. R. Co., 412.
 v. Washington Tp., 108.
 McCormick Harvesting Mach. Co. v. Burandt, 511.
 McCosker v. Long Island R. Co., 524.
 McCoy v. Milwaukee St. Ry. Co., 239.
 v. Trucks, 270.
 McCue v. Klein, 119, 256.
 v. National Starch Manuf'g Co., 509.
 McCullough v. Railroad Co., 499.
 McDonald v. City of Red Wing, 56, 91.
 v. Mallory, 11.
 v. Massachusetts General Hospital, 110.
 v. Press Pub. Co., 297, 302.
 v. Snelling, 34, 219.
 v. Walter, 240.
 McDonough v. Gilman, 131.
 McDowell v. Railway Co., 183.
 McDuff v. Detroit Evening Journal Co., 292.

[The figures refer to pages.]

- McEacheran v. Michigan Cent. R. Co., 176.
 v. Western Transp. Co., 343.
 McElfresh v. Kirkendall, 128.
 McElroy v. Goble, 202.
 Macey v. Childress, 353.
 McFadden v. Missouri Pac. Ry. Co., 174.
 v. Rausch, 448.
 MacFadzen v. Ollivant, 265.
 McFerran v. Taylor, 332.
 McGahan v. Indianapolis Natural Gas Co., 47.
 McGibbons v. Wilder, 333.
 McGinn v. Tobey, 345.
 McGinty v. Athol Reservoir Co., 527.
 McGovern v. New York Cent. & H. R. R. Co., 185.
 McGrath v. Merwin, 113.
 v. Texas & P. Ry. Co., 514.
 McGregor v. Brown, 401.
 McGrew v. Stone, 6.
 McGuerty v. Hale, 508.
 McGuire v. Bloomington, 56, 90.
 McIlvain v. Porter, 397.
 McIntire v. Roberts, 467.
 McIntire Ry. Co. v. Bolton, 505.
 McIntyre v. New York Cent. R. Co., 201.
 v. Sholty, 94.
 McIntyre Tp. v. Walsh, 15.
 Mackay v. Commercial Bank, 102.
 McKay v. State, 7, 254.
 McKee v. Delaware & H. Canal Co., 424.
 v. Ingalls, 100, 299.
 McKeen v. Morse, 176.
 McKensie v. Missouri Pac. Ry. Co., 353.
 McKim v. Bartlett, 202.
 Mackin v. Alaska Refrigerator Co., 509.
 McKinley v. Railroad Co., 231.
 McKinnon v. Penson, 60.
 v. Vollmar, 153.
 McLaughlin v. Cowley, 310.
 v. Pryor, 499.
 v. Walte, 404.
 McLean v. New York Press Co., 282.
 v. Warring, 308.
 McLendon v. State, 81, 248.
 McLennon v. Richardson, 251.
 McLeod v. Boulton, 58.
 v. Jones, 390.
 v. Wakley, 316.
 McLoughlin v. New York Lighterage Transp. Co., 134.
 McMahon v. City of New York, 188.
 v. Hallock, 294.
 v. Railroad Co., 233.
 McManus v. Crickett, 146.
 McMinn v. Pittsburgh, M. & Y. R. Co., 117.
 McMurtry v. Louisville, N. O. & T. R. Co., 485.
 McNair v. Toler, 101.
 McNamara v. MacDonough, 526.
 v. New York Cent. & H. R. R. Co., 479.
 v. Village of Clintonville, 210.
 McNaughton v. Quay, 309.
 McNay v. Stratton, 245, 251.
 McNeill v. New York, L. E. & W. R. Co., 514.
 Macomber v. Nichols, 450.
 Maconnehey v. State, 100.
 McPherson v. Daniels, 303, 322.
 v. Railroad Co., 455.
 v. Runyon, 352.
 McSorley v. Faulkner, 15.
 MacVeagh v. Bailey, 219.
 McVeigh v. United States, 100, 101.
 McVeety v. St. Paul, M. & M. Ry. Co., 114.
 McWilliams' Case, 490.
 Madras R. Co. v. Zemindar of Carvatenagarun, 457.
 Magnin v. Dinsmore, 172.
 Maguinay v. Saudek, 268.
 Maguire v. Middlesex Ry. Co., 112.
 Mahaffey v. Byers, 355.
 Mahan v. Brown, 32, 51, 52, 371, 422, 432, 435.
 Maher v. Ashmead, 244, 350.
 Mahon v. Burns, 133.
 Mahoney v. Belford, 238.
 Mahurin v. Harding, 330.
 Maier v. Randolph, 145.
 Main v. Main, 275.
 Mairs v. Real-Estate Ass'n, 379.
 Malachy v. Soper, 323.
 Malcom v. Spoor, 361.
 Malcomson v. Scott, 250.
 Maleverer v. Spinke, 56.

[The figures refer to pages.]

- Mali v. Lord, 150, 160.
 Malinleml v. Gronlund, 251.
 Mallach v. Ridley, 147, 151.
 Mallalieu v. Laughner, 410.
 Mallory v. Ferguson, 82.
 v. Pioneer Press Co., 315.
 Malone v. Stewart, 294.
 Managers of the Metropolitan Asylum
 Dist. v. Hill, 55, 86, 439.
 Manchester, S. & L. R. Co. v. Brown,
 172.
 Maness v. Henry, 178.
 Maney v. Chicago, B. & Q. R. Co.,
 478.
 Mangam v. Brooklyn R. Co., 500.
 v. Peck, 128.
 Mangan v. Atterton, 495, 500.
 Manger v. Shipman, 460.
 Manget v. O'Neill, 239.
 Manhattan Life Ins. Co. v. Forty-Second
 St. & G. St. F. R. Co., 104.
 Manley v. Field, 266.
 Mann v. Barrett, 266.
 Mann Boudoir-Car Co. v. Dupre, 209.
 Manning v. Johnson, 99.
 v. Mitchell, 244.
 v. State of Nicaragua, 72.
 Mantel v. Railway Co., 487.
 Manvell v. Thomson, 268, 271.
 Mapstrick v. Ramge, 371.
 Marble v. Chapin, 284.
 v. City of Worcester, 218.
 Marfell v. Railroad Co., 466.
 Marie, The, 72, 135.
 Marine Bank v. Rushmore, 163.
 Markley v. Whitman, 118.
 Marks v. Baker, 303, 312, 315, 318,
 321.
 v. Sullivan, 75, 249.
 v. Townsend, 248, 356, 360.
 v. Wright, 414.
 Marlowe v. Rogers, 414.
 Marlsbary v. State, 261.
 Marquet v. La Duke, 460.
 Marquis of Downshire v. Sandys, 401.
 Marr v. W. U. Tel. Co., 483.
 Mars v. Delaware & H. Canal Co.,
 152.
 Marsan v. French, 443.
 Marsh v. Billings, 200, 324.
 v. Falker, 330, 336.
 v. Herman, 526.
 Marsh v. Loader, 250.
 Marshall v. Gilman, 181.
 v. Heller, 246.
 v. Oakes, 128.
 v. Railroad Co., 188.
 v. Welwood, 456, 473.
 v. Widdicombe Furniture Co., 506.
 v. York, N. & B. Ry. Co., 469.
 Marshalsea Case, 77.
 Martin, Ex parte, 446.
 v. Chicago & A. Ry. Co., 521.
 v. Gilham, 398.
 v. Houghton, 392.
 v. Jordan, 344.
 v. Kennedy, 123.
 v. Mayor, etc., 83.
 v. Payne, 266-268.
 v. Railroad Co., 489.
 v. Robson, 128.
 v. St. Louis, I. M. & S. Ry. Co.,
 48.
 Martinez v. Gerber, 265.
 Marvin Safe Co. v. Ward, 471.
 Marx v. Press Pub. Co., 307.
 Marzetti v. Williams, 20, 201, 202.
 Mason v. Keeling, 460.
 v. Mason, 275, 310.
 v. Richmond & D. R. Co., 515.
 Massuere v. Dickens, 59, 294.
 Mathews v. Terry, 56.
 v. Tramways Co., 49.
 Mathis v. Carpenter, 81.
 Matlock v. Reppy, 170.
 Matteson v. Strong, 490.
 Matthews v. Bliss, 342.
 Mattice v. Wilcox, 301.
 Mattimore v. City of Erie, 496.
 Maund v. Monmouthshire Canal Co.,
 102.
 Maxmillan v. Mayor, 111.
 Max Morris, The, 489, 496.
 Maxwell v. Bay City Bridge Co., 393.
 v. Pike, 82.
 May v. Burdett, 460.
 Mayer v. Duke, 237.
 v. Journeymen Stone-Cutters'
 Ass'n, 309.
 v. Walter, 351, 353, 361.
 Mayhew v. Phoenix Ins. Co., 337.
 Maynard v. Boston & M. R. Co., 115.
 v. Fireman's Ins. Co., 102.
 v. Railroad Co., 115.

[The figures refer to pages.]

- Mayor of City of Albany v. Cunliff, 107.
 Mayor & City Council of Baltimore v. Marriott, 489.
 Mayor & City Council of Cumberland v. Willison, 107.
 Maysville St. R. & T. Co. v. Marvin, 188.
 Mead v. Bunn, 346.
 v. Stratton, 221.
 Meader v. Stone, 256.
 Meagher v. Driscoll, 233.
 Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo, 406.
 Mechesney v. Unity Tp. Co., 46.
 Medbury v. Watson, 336, 339.
 Meegan v. McKay, 461.
 Meeks v. Southern Pac. R. Co., 500.
 Meese v. City of Fond du Lac, 280.
 Mehroff v. Mehroff, 278.
 Meldel v. Anthis, 236.
 Meigs v. Lister, 433.
 Meiners v. Frederick Miller Brewing Co., 446.
 Melxell v. Morgan, 427.
 Mellen v. Morrill, 428.
 Mellor v. Merchants' Manuf'g Co., 517.
 v. Spateman, 201, 204.
 Melvin v. Chancy, 62.
 Membrey v. Great Western Ry. Co., 117.
 Mendenhall v. Klinck, 393.
 Menger v. Laur, 489.
 Mentel v. Hippely, 353.
 Mercer v. Corbin, 25, 253, 257, 461, 465.
 Merchants' Bank v. State Bank, 103.
 Merchants' Nat. Bank v. National Bank of the Commonwealth, 16.
 Merchants' & P. Bank v. Meyer, 415.
 Mercier v. Mercier, 481.
 Meredith v. Reed, 461.
 Mergenthaler v. Kirby, 115.
 Merivale v. Carson, 316.
 Merriam v. Cunningham, 99.
 Merrick v. Hill, 182.
 Merrifield v. Lombard, 424.
 Merrill v. Eastern R. Co., 485.
 Merritt v. Earle, 470.
 Merryweather v. Nixan, 23, 123.
 Mersey Docks & Harbour Board v. Gibbs, 110.
 Meservey v. Lockett, 465.
 Metallic Compression Casting Co. v. Fitchburg R. Co., 56, 91.
 Metropolitan Asylum Dist. v. Hill, 57, 86, 91.
 Metropolitan St. Ry. Co. v. Johnson, 280.
 Mewhirter v. Hatten, 279.
 Meyer v. Amidon, 330.
 Meyrose v. Adams, 324.
 Michael v. Roanoke Mach. Works, 509.
 Michaelson v. Denison, 56, 91.
 Michaud v. Eisenmenger, 344.
 Michelson v. Lavin, 299.
 Michigan Cent. R. Co. v. Burrows, 48.
 v. Coleman, 279.
 v. Curtis, 48.
 v. Gilbert, 487.
 v. Smithson, 506, 509.
 Mickles v. Hart, 203.
 Middleton v. Fowler, 146.
 Mielenz v. Quasdorf, 284, 285.
 Milburne v. Byrne, 265.
 Miles v. City of Worcester, 106, 420.
 v. Van Horn, 302.
 Mill v. Hawker, 104.
 Miller v. Baker, 383, 407.
 v. I vld, 300.
 v. Highland Ditch Co., 122.
 v. Hope, 310.
 v. Hyde, 409.
 v. Lamery, 414.
 v. Milligan, 355.
 v. Parish, 299.
 v. Proctor, 474.
 v. Railroad Co., 130, 189, 221, 394.
 v. Staples, 142, 167.
 v. Sweltzer, 128.
 v. U. S., 101.
 v. Waddingham, 403.
 v. Woodhead, 454, 471.
 Miller's Case, 301.
 Milligan, Ex parte, 32.
 v. Wedge, 135.
 Milliken v. Hathaway, 415.
 Mills v. Graham, 99.
 v. Hall, 441.
 v. U. S., 13.
 v. Wooters, 393.

[The figures refer to pages.]

- Milwaukee & C. R. Co. v. Kellogg**, 46, 214.
Milwaukee & St. P. R. Co. v. Arms, 235, 451, 453.
 v. Kellogg, 46, 214, 220, 486.
Minaghan v. State, 258.
Ming v. Woolfolk, 342, 343.
Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 394.
Mirkil v. Morgan, 444.
Missouri Lumber & Min. Co. v. Zeitinger, 387.
Missouri Pac. R. Co. v. Behee, 319.
 v. Brazzil, 177.
 v. Cullers, 48.
 v. Hackett, 466.
 v. Haley, 531.
 v. Mackey, 531.
 v. Moseley, 49, 493.
 v. Peay, 239.
 v. Texas Pac. Ry. Co., 498.
Mitchell v. Bradstreet Co., 297, 313, 318.
 v. Bridger, 385.
 v. Clarke, 219.
 v. Colliery Co., 65.
 v. Crassweller, 159.
 v. Darley Main Colliery Co., 190.
 v. Foster, 77.
 v. Harmony, 69.
 v. Jenkins, 62, 355, 358.
 v. Malone, 249.
 v. Milholland, 293, 303.
 v. Mitchell, 253.
 v. New York, L. E. & W. R. Co., 114.
 v. Rockland, 108.
 v. Sharon, 299.
 v. State, 360.
 v. Tarbutt, 123.
 v. U. S., 71.
Mize v. Glenn, 201.
M. Moxham, The, 64.
Mobile Life Ins. Co. v. Brame, 183, 185.
Mobile & O. R. Co. v. Massey, 524.
Modisett v. McPike, 276, 277.
Moens v. Heyworth, 333.
Moffat v. U. S., 69.
Moffatt v. Fisher, 356.
Mogul Steamship Co. v. McGregor, 26, 56, 61, 89, 327, 368, 371-374.
Mohr v. Gault, 445.
Mohry v. Hoffman, 267.
Moline Plow Co. v. Webb, 190.
Molm v. Barton, 410.
Monaghan v. Cox, 357.
Monk v. Town of New Utrecht, 100.
Monks v. Monks, 301.
Monmouth Min. & Manuf'g Co. v. Erling, 523.
Monongahela City v. Fischer, 495.
Monroe v. Whipple, 411.
Montgomery v. Booming Co., 451, 452.
 v. Gilmer, 106.
Montreal River Lumber Co. v. Mihills, 331, 332.
Moody v. Baker, 292.
Mooney v. Davis, 342.
 v. Miller, 338.
Moon's Adm'r v. Richmond & A. R. Co., 523.
Moore v. Appleton, 142.
 v. City of Minneapolis, 463.
 v. Davis, 216.
 v. Eastman, 98.
 v. Francis, 300.
 v. Hall, 225.
 v. Hill, 409.
 v. Langdon, 443, 448.
 v. Manufacturers' Nat. Bank, 311.
 v. Railway Co., 145.
 v. Sanborne, 159.
 v. Thompson, 244, 246, 250, 307.
 v. Wabash, St. L. & P. R. Co., 519.
Moore v. Bricklayers' Union, 371.
Morain v. Devlin, 95.
Moran v. Dawes, 265.
 v. Smell, 32.
Morange v. Mix, 82.
Morasse v. Brochu, 300, 307.
Morehouse v. Northrop, 40.
Moreland v. Atchison, 338.
Moreton v. Hardern, 121.
Morey v. Morning Journal Ass'n, 323.
Morford v. Woodworth, 448.
Morgan v. Cox, 29.
 v. Curley, 232.
 v. Halberstadt, 297.
 v. Lingen, 295.
 v. Ross, 272.
 v. Smith, 134, 521.
 v. Tener, 145, 191.
 v. Vale of Neath Ry. Co., 522.

[The figures refer to pages.]

Morgenstein v. Nejedlo, 258.
 Morier v. St. Paul, M. & M. Ry. Co., 149.
 Moriarty v. Bartlett, 186.
 Moritz v. Garnhart, 268.
 Morley v. Chase, 251.
 Morning Journal Ass'n v. Rutherford, 306.
 Morris, The Max, 480.
 v. Platt, 31, 57, 63, 92.
 v. Robinson, 194.
 v. Tuthill, 371.
 Morrison v. Davis, 48, 216.
 v. Koch, 338.
 v. Lawrence, 107.
 v. Marquardt, 446.
 v. Press Pub. Co., 321.
 Morse v. Crawford, 414.
 Mortin v. Shoppee, 252, 255.
 Morton v. Young, 356.
 Moses v. Dubois, 245.
 v. Johnson, 401.
 Mott v. Consumers' Ice Co., 159.
 Moulton v. Beecher, 353.
 v. Inhabitants of Sandford, 45, 208, 218.
 v. St. Paul, M. & M. Ry. Co., 174.
 Mount v. Derick, 412.
 Mouse's Case, 56, 91.
 Mowry v. Chase, 244, 246.
 v. Wood, 418.
 Moxham, The M., 64.
 Moynahan v. Wheeler, 383.
 Moynihan v. Hills, 510.
 M. P. R. Co. v. Barnes, 175.
 Mueller v. Fruen, 441.
 v. Kuhn, 385.
 Muggridge v. Eveleth, 113.
 Mulcahey v. Givens, 221.
 Muldoon v. Rickey, 62, 351.
 Mulgrave v. Ogden, 407, 411.
 Mulin v. Spangenberg, 272.
 Mullen v. Brown, 360.
 v. St. John, 458, 484.
 Muller v. McKesson, 459, 460.
 Mulligan v. New York & R. B. Ry. Co., 160.
 Mullin v. Northern Mill Co., 505.
 v. Spangenberg, 272.
 Mulvehall v. Millward, 267, 268.
 Munger v. Hess, 100.
 Munns v. Depont, 358.

Munos v. Southern Pac. Co., 189.
 Munster v. Lamb, 310.
 Murdock v. Walker, 49, 495.
 Murdock Parlor-Grate Co. v. Com., 69, 70.
 Murphy v. City of Fond du Lac, 53, 201.
 v. Deane, 493.
 v. Martin, 248, 350, 360.
 v. Nelson, 311.
 v. Walters, 247.
 Murray v. Gast Lithographic & Engraving Co., 273.
 v. Hall, 385.
 v. McGarigle, 376.
 v. McShane, 430.
 v. Railroad Co., 520.
 Murtaugh v. St. Louis, 111.
 Musgrove v. Newell, 355.
 Mustard v. Wohlford's Helrs, 99.
 Mutrie v. Binney, 64.
 Myers v. Dresden, 59.
 v. Malcolm, 459.
 v. San Francisco, 236.
 Myron v. Union R. Co., 178.

N

Nachtman v. Hammer, 355.
 Nagle v. Mullison, 236, 397.
 Nash v. Jewett, 99.
 v. Minnesota Title Ins. & Trust Co., 335.
 v. Trust Co., 332, 340.
 Nashua Iron & Steel Co. v. Worcester & N. R. Co., 124, 125, 488, 493.
 Nashville v. Comar, 224.
 Nashville & C. R. Co. v. Carroll, 524.
 National Bank v. Graham, 103.
 v. Sprague, 280.
 National Copper Co. v. Minnesota Min. Co., 225, 227-229.
 National Exch. Bank v. Beal, 164.
 National Exch. Co. v. Drew, 141.
 National Life Ins. Co. v. Minch, 40.
 National Tel. Co. v. Baker, 462.
 National Trust Co. v. Gleason, 38.
 Naumberg v. Young, 132.
 Nave v. Flack, 114.
 Neal v. Gillett, 495.
 v. Northern Pac. R. Co., 524.

[The figures refer to pages.]

- Neall v. Hart, 244.
 Nealon v. Frisbie, 294.
 Nebenzahl v. Townsend, 360.
 Neeb v. Hope, 305.
 Neff v. Landis, 99.
 v. Paddock, 428.
 Nehr v. State, 430.
 Neiler v. Kelley, 418.
 Nelmitz v. Conrad, 249.
 Nelson v. Danielson, 351.
 v. Galveston, H. & S. A. Ry. Co., 182.
 v. Liverpool Brewery Co., 131.
 v. Luling, 344.
 v. Railroad Co., 221.
 v. Wallace, 288, 321.
 Nesbit v. Town of Garner, 499.
 Netherland-American Steam Nav. Co. v. Hollander, 273.
 Nettles v. Somervell, 300.
 Neubauer v. Railroad Co., 487.
 Neufeld v. Rodeminski, 355.
 Nevada Bank v. Portland Nat. Bank, 104, 336, 341.
 Neveu v. Sears, 151.
 Nevin v. Pullman, etc., Co., 470.
 Newark Aqueduct Board v. City of Passaic, 447.
 Newark Coal Co. v. Upson, 353.
 Newbold v. Bradstreet, 300.
 Newcomb v. Boston Protective Department, 46, 478, 479, 493.
 v. Wallace, 201.
 Newcommen v. Coulson, 395.
 Newell v. Cowan, 8.
 v. Whitcher, 256.
 Newhard v. Railroad Co., 450.
 New Haven Steam-Boat Co. v. Mayor, etc., 216.
 New Holland Turnpike Co. v. Farmers' Ins. Co., 190.
 Newkirk v. Sabler, 389.
 Newman v. Earl of Hardwicke, 76.
 v. Phillisburg Horse-Car R. Co., 500, 501.
 v. Railway Co., 187.
 New Orleans, J. & G. N. R. Co. v. Hurst, 15.
 New Orleans, M. & C. R. Co. v. Hanning, 133.
 New Orleans, St. L. & C. R. Co. v. Burke, 237.
 New Orleans & C. R. Co. v. Schneider, 239.
 New Orleans & N. W. R. Co. v. Reese, 137.
 Newport News & M. V. Co. v. Dentzel's Adm'r, 524.
 New River Co. v. Johnson, 425.
 Newson v. Pender, 435.
 Newsum v. Newsum, 209.
 Newton v. Harland, 395.
 v. Locklin, 250.
 New World, The, v. King, 453.
 New York Cent. & H. R. R. Co. v. City of Rochester, 106.
 New York Guaranty Co. v. Gleason, 38.
 New York, L. E. & W. R. Co. v. Leaman, 477.
 v. Steinbrenner, 499.
 New York Lighterage & Transp. Co. v. Pennsylvania R. Co., 48.
 New York Rubber Co. v. Rothery, 202, 424.
 New York & B. Sawmill & Lumber Co. v. City of Brooklyn, 108.
 New York & C. Mining Syndicate & Co. v. Fraser, 216.
 New York & M. L. R. Co. v. Winans, 137.
 New York & N. H. R. Co. v. Schuyler, 102, 103.
 New York & Washington Printing Tel. Co. v. Dryburg, 165, 174, 469, 471-474.
 Nichol v. Martyn, 265.
 Nicholds v. Crystal Plate-Glass Co., 239.
 Nicholl v. Allen, 60.
 Nichols v. City of Boston, 444.
 v. City of Duluth, 423.
 v. Marsland, 458.
 v. Newsom, 407.
 v. Winfrey, 187.
 Nicholson v. Getchell, 446.
 v. Mounsey, 145.
 v. New York & N. H. R. Co., 240.
 Nicoll v. Glennie, 123.
 Nims v. Mt. Hermon Boys' School, 42, 104.
 Nisbet v. Patton, 414.
 Nitro-Glycerine Case, 31, 63, 459, 462.

[The figures refer to pages.]

Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co., 49.
 Nixon v. Jenkins, 411.
 v. Selby Smelting & Lead Co., 526.
 Noblesville & E. G. R. Co. v. Gause, 149.
 Noice v. Brown, 265.
 Nolan v. Jones, 99.
 Norcross v. Otis Bros. & Co., 32.
 v. Thoms, 420, 429.
 Norfolk & W. R. Co. v. Groseclose's Adm'r, 501.
 v. Hoover, 524.
 v. Phelps, 530.
 Norrell v. Vogel, 357.
 Norris v. Casel, 258.
 v. Corkill, 128.
 v. Litchfield, 112, 403, 494.
 v. Saxton, 465.
 Northam v. Hurley, 201.
 Northampton Co. v. Lafayette College, 112.
 Northampton's Case, 322.
 North Carolina v. Temple, 71.
 North Chicago City R. Co. v. Gastka, 147.
 North Chicago Rolling-Mill Co. v. Johnson, 496.
 Northern Pac. Coal Co. v. Richmond, 518.
 Northern Pac. R. Co. v. Babcock, 64.
 v. Charless, 505.
 v. Everett, 514.
 v. Hambly, 523-525, 528.
 v. Herbert, 508, 510, 521.
 v. Lewis, 386, 478.
 v. Nickels, 508, 515.
 v. Whalen, 437.
 Northern Transp. Co. v. City of Chicago, 87, 88.
 North Pennsylvania R. Co. v. Mahoney, 123.
 v. Rehman, 461.
 Northrop v. Hill, 191.
 Northwestern Fertilizing Co. v. Hyde Park, 86.
 Northwestern Fuel Co. v. Danielson, 530.
 Northwestern Mut. Life Ins. Co. v. Elliott, 113.

Northwest Transp. Co. v. Boston Marine Ins. Co., 45, 208.
 Norton v. Sewall, 473.
 v. Warner, 239.
 v. Wiswall, 186.
 Norwalk Gaslight Co. v. Borough of Norwalk, 135, 136.
 Norwood v. Railroad Co., 455.
 Notting Hill, The, 221.
 Nounnan v. Sutter County Land Co., 344.
 Nourse v. Packard, 233.
 Nowak v. Waller, 247.
 Nowlan v. Cain, 332.
 Noxon v. Hill, 77.
 Noyes v. Wood, 526.
 Nugent v. Levee Com'rs, 79.
 Nye v. Merriam, 343, 344.

O

O'Brien v. Barry, 352.
 v. Clement, 288.
 v. People, 100.
 Ocean Grove v. Asbury Park, 56, 425.
 Ocean Steamship Co. v. Williams, 244.
 O'Connor v. Andrews, 131.
 v. Sill, 298, 315.
 Odell v. Railroad Co., 514, 529.
 v. Schroeder, 106.
 Odlin v. Stetson, 474.
 Ogden v. Claycomb, 114, 115.
 v. Turner, 298.
 Ogley v. Miles, 517.
 Ohio & M. R. Co. v. Hecht, 210.
 O'Keefe v. Brownell, 526.
 v. Chicago, R. I. & P. R. Co., 496.
 O'Keefe's Adm'r v. Chicago, R. I. & P. R. Co., 490.
 Old Dominion S. S. Co. v. McKenna, 365, 374.
 Olds v. Chicago Open Board of Trade, 407, 413.
 Olesen v. City of Plattsburgh, 114.
 O'Linda v. Lothrop, 396.
 Olive v. Van Patten, 371, 375.
 Oliver v. La Valle, 232.
 v. McClellan, 96.
 v. Perkins, 18.
 v. Town of La Valle, 209, 218, 232.
 Olmstead v. Brush, 202.

[The figures refer to pages.]

Olsen v. Upsahl, 393.
Olson v. Railway Co., 466.
 v. St. Paul, M. & M. Ry. Co., 524.
 v. Tvette, 351.
Omaha St. Ry. Co. v. Cameron, 466.
Omaha & R. V. R. Co. v. Brady, 455.
 v. Clarke, 455.
O'Maley v. Dorn, 465.
 v. South Boston Gaslight Co., 118,
 518.
Oppenheimer v. United States Exp.
 Co., 174.
Orange Co. Bank v. Brown, 470.
Ordway v. Ferrin, 392.
Oregon Ry. & Nav. Co. v. Oregonian
 Ry. Co., 137.
O'Reilly v. Shadle, 413.
O'Riley v. McChesney, 204.
Orr v. Box, 81.
 v. Quimby, 83.
Osborn v. Gillett, 184, 185, 264, 265.
 v. Potter, 404, 411, 412.
 v. Veitch, 253, 254, 259.
Osborne v. McMasters, 478.
 v. Morgan, 167.
O'Shaughnessy v. Baxter, 84.
Osmun v. Winters, 238.
Ostatag v. Taylor, 395.
Osten v. Jerome, 427.
Ottawa Gaslight & Coke Co. v. Gra-
 ham, 426.
Ottenot v. Railroad Co., 226.
Oullette v. Overman Wheel Co., 486.
Over v. Schiffing, 319.
Overend v. Gurney, 183.
Owens v. Kansas City, St. J. & C. B.
 R. Co., 210.
Owings v. Jones, 131, 476.
Owsley v. Railway Co., 102.
Oxford v. Peter, 144, 147.
Oxley v. Railway Co., 470.
 v. Watts, 392.
Ozark Land Co. v. Leonard, 381.

P

Pack v. Mayor, etc., 138.
Packard v. Getman, 407, 412.
 v. Slack, 216.
Paddock v. Somes, 234, 447.
Padmore v. Lawrence, 310, 317.
 v. Piltz, 261.

Page v. Cushing, 361.
 v. Ford, 215.
 v. Mille Lacs Lumber Co., 438.
 v. Parker, 32, 366.
 v. Wiple, 62.
Paget v. Birkbeck, 122.
Painter v. Mayor, etc., 133.
 v. Pittsburg, 137.
Palfrey v. Portland, S. & P. R. Co.,
 185.
Palmer v. Bell, 346.
 v. Broder, 118, 357.
 v. Crook, 238.
 v. Gallup, 203.
 v. Inhabitants of Andover, 218.
 v. McMaster, 82.
 v. Railroad Co., 452.
Palmeri v. Railway Co., 147, 150, 160.
Palsey v. Freeman, 19, 50, 330, 336,
 340.
Pangburn v. Bull, 352.
Panton v. Holland, 33.
Pantzar v. Tilly Foster I. M. Co., 526.
Pappa v. Rose, 74.
Parish v. Williams, 461.
Park v. Detroit Free Press Co., 308,
 314, 320.
Parke v. Kilham, 430.
Parker v. Barnard, 467, 476, 478.
 v. Catholic Bishop, 441.
 v. Farley, 353, 356.
 v. Foote, 422.
 v. Godin, 408.
 v. Huntington, 365, 374.
 v. Lake Shore & M. S. Ry. Co., 479.
 v. Lombard, 416.
 v. Moulton, 347.
 v. New York & N. E. R. Co., 511.
Park Hotel Co. v. Lockhart, 512.
Parks v. Newburyport, 427.
Parlement Belge, The, 72.
Parmalee v. Loomis, 409.
Parmiter v. Coupland, 313.
Parnaby v. Canal Co., 103, 110.
Parrat v. Carpenter, 291.
Parrott v. Hartsfield, 92.
 v. Housatonic R. Co., 448.
 v. Wells, 463.
Parsons v. Sutton, 418.
 v. Tuolumne County Water Co.,
 446.
 v. Winchell, 235.

[The figures refer to pages.]

- Pastene v. Adams, 152.
 Pastorius v. Fisher, 200.
 Pater v. Baker, 324, 325.
 Patrick v. Colerick, 390, 394.
 v. Colorado Smelting Co., 200.
 v. Greenway, 204.
 Patrol v. Boyd, 111.
 Patten v. Gurney, 122.
 v. Rea, 145.
 Patterson v. Detroit, L. & N. R. Co.,
 476.
 v. Hayden, 270.
 v. Nutter, 261.
 v. Prior, 38.
 v. Westervelt, 203.
 v. Wilkinson, 302.
 v. Wright, 338.
 Patzack v. Von Gerichten, 77.
 Paul v. Hummel, 96.
 v. Slason, 59, 200.
 v. Summerhayes, 391.
 Pauley v. Steam-Gauge & Lantern Co.,
 476.
 Paull v. Halferty, 325.
 Pavitt v. Lehigh Val. R. Co., 172.
 Pavlovski v. Thornton, 284.
 Paxton v. Boyer, 31, 57, 63, 92.
 Payne v. Allen, 56.
 v. Donegan, 352.
 v. Newcomb, 146.
 v. Western & A. R. Co., 368, 374.
 Payson v. Caswell, 356.
 Peabody v. Hayt, 13.
 Peacock v. Terry, 113.
 Peak v. Lemon, 129.
 v. Frost, 335.
 Peake v. Oldham, 296.
 Pearce v. Needham, 247, 251.
 Pearl v. Walter, 343.
 Pearman v. Pearman, 274.
 Pearson v. Carr, 224.
 v. Zehr, 397.
 Pease v. Smith, 407.
 Peck v. Cooper, 142.
 v. Railway Co., 145.
 Peek v. Derry, 332, 342.
 v. Gurney, 330, 335, 336, 340.
 v. Railway Co., 172.
 Peigne v. Sutcliffe, 96, 98.
 Peil v. Reinhart, 130.
 Pelton v. Schmidt, 467.
 Pence v. Dozler, 119, 268.
 Penn v. Preston, 388.
 Pennington v. Streight, 77.
 Pennoyer v. Allen, 421, 430.
 v. McConnaughy, 71.
 Pennsylvania Coal Co. v. Sanderson,
 425, 457.
 Pennsylvania Co. v. Chicago, M. & St.
 P. R. Co., 190.
 v. Dolan, 178.
 v. Graham, 233.
 v. Horton, 478.
 v. Langendorf, 492.
 v. Newmeyer, 508.
 v. Roney, 57, 91.
 v. Smith, 452.
 v. Stoelke, 486, 487.
 Pennsylvania R. Co. v. Bell, 187.
 v. Goodenough, 280.
 v. Hope, 46.
 v. Horst, 481.
 v. Prie, 467.
 v. Vandiver, 102.
 v. Wabash, St. L. & P. R. Co., 215.
 Pennsylvania & O. Canal Co. v. Gra-
 ham, 231.
 Penrose v. Curren, 99.
 People v. Bartels, 82.
 v. Board of Health of City of Yon-
 kers, 440, 445.
 v. Board of Sup'rs, 108.
 v. Butler, 83.
 v. Clark, 270.
 v. Dann, 259.
 v. Detroit White Lead Works, 421,
 430, 432, 434, 444.
 v. Foss, 259.
 v. Lilley, 7, 254.
 v. Maher, 442.
 v. Musical Mutual Protective
 Union, 90.
 v. Pearl, 260.
 v. Roby, 145.
 v. Ryan, 7.
 v. Walsen, 8.
 v. Warren, 249.
 v. Winters, 274.
 v. Wood, 468.
 v. Yslas, 253.
 Peoria v. Simpson, 123.
 Percival v. Harres, 336.
 v. Hickey, 11, 13, 15.
 Perkins v. Ladd, 407.

[The figures refer to pages.]

- Perkins v. Lockwood**, 179.
 v. Mitchell, 72.
 v. Rogg, 369.
 v. Smith, 164, 408, 415.
 v. Stein, 33.
Perkinson v. Gilford, 184.
Perley v. Eastern R. Co., 46, 208.
Perry v. House of Refuge, 79.
 v. Lovejoy, 276.
 v. Porter, 308.
Peruvian Guano Co. v. Bockwoldt, 64.
Peschel v. Chicago, M. & St. P. Ry. Co., 526.
Peteler Portable Ry. Manuf'g Co. v. Northwestern Adamant Manuf'g Co., 486.
Peters v. Bourneau, 323.
 v. Lake, 272, 276.
 v. Land, 78.
Peters v. Peters, 275.
Peterson v. Haffner, 33, 96.
 v. Knoble, 146.
 v. Toner, 350.
Petre v. Heneage, 413.
Petrie v. Lamont, 121.
Petsch v. Dispatch Printing Co., 288.
Pettibone v. Simpson, 290.
Pettingill v. Rideout, 8.
Phelin v. Kenderdine, 233, 269, 272.
Phelps v. Delmore, 414.
 v. Nowlen, 32, 371, 426, 432.
 v. Stearns, 80.
 v. Walt, 166.
Philadelphia v. Masonic Home, 111.
Philadelphia Traction Co. v. Orbann, 236.
Philadelphia, W. & B. R. Co. v. Hogleland, 499.
 v. Stebbing, 482.
 v. Philadelphia & H. de G. Steam Towboat Co., 10.
Philadelphia & R. R. Co. v. Derby, 102, 148.
 v. Hummell, 114, 467.
 v. Smith, 63, 444, 489.
Phillip Best Brewing Co. v. Pillsbury & Hurlbut Elevator Co., 411.
Phillips v. Barnet, 125, 126, 275.
 v. Brigham, 411.
 v. Chicago, M. & St. P. Ry. Co., 521.
 v. Claggett, 177.
Phillips v. Dewald, 465.
 v. Dickerson, 221, 232, 233.
 v. Eyre, 8, 64.
 v. Fadden, 251.
 v. Homfray, 183.
 v. Hoyle, 233, 272.
 v. Jansen, 285.
 v. Trull, 250.
 v. Wilpers, 115.
 v. Village of Kalamazoo, 356.
Philp v. Squire, 265, 277.
Philpott v. Kelley, 413.
 v. Missouri Pac. Ry., 188.
Phoenix Ins. Co. v. Erie & W. Transp. Co., 172.
Phyfe v. Railroad Co., 221.
Picard v. McCormick, 337.
Pickens v. Diecker, 144.
Pickering v. Busk, 153.
 v. Dawson, 334.
 v. Rudd, 382.
Pickett v. Crook, 237.
 v. Pearsons, 43.
 v. Wallace, 76.
Piedmont & C. Ry. Co. v. McKenzie, 49, 455.
Pierce v. Hilton, 182.
 v. Jackson, 81.
 v. Millay, 231.
Pierro v. Railway Co., 222.
Piette v. Bavarian Brewing Co., 133.
Pike v. Grand-Trunk Ry. Co., 46.
 v. Hanson, 246.
 v. Megoun, 75.
 v. Van Wormer, 301.
Pilcher v. Hart, 434.
Pinchin v. London & B. Ry. Co., 382.
Pine Bluff Water & Light Co. v. Derisseaux, 467.
Pinkerton v. Gilbert, 247.
 v. Verberg, 251.
Pinnel's Case, 178.
Piollet v. Simmers, 455.
Piper v. Minneapolis St. Ry. Co., 491.
 v. Pearson, 76, 77.
 v. Woolman, 301, 317.
Pitt v. Donovan, 325.
Pittard v. Oliver, 284.
Pittsburg, F. W. & C. Ry. Co. v. Powers, 508.
Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 235.

[The figures refer to pages.]

- Pittsburgh, C. & St. L. Ry. Co. v.**
 Adams, 518.
 v. Bennett, 485.
 v. Shields, 103.
Pittsburgh City v. Grier, 20, 49.
Pittsburgh S. Ry. Co. v. Taylor, 236.
Pixley v. Reed, 353.
Place v. Minster, 365.
 v. Taylor, 78.
Planz v. Boston & A. R. Co., 115, 116,
 150.
Platt v. Brown, 231.
Platte & D. Canal & Milling Co. v.
 Dowell, 502.
Platz v. Cohoes, 114.
Pleasants v. Fant, 481.
Plucknett v. Tippey, 242.
Plummer v. Dill, 467, 468.
 v. Webb, 185.
Pocock v. Moore, 246.
Poeppers v. Railway Co., 219, 220.
Poindexter v. Greenhow, 70.
Pokrok Zapadu Pub. Co. v. Zizkovsky,
 304.
Polack v. Ploche, 49.
Poland v. Brownell, 344.
Polhill v. Walter, 330.
Pollard v. Lyon, 291.
 v. Photographic Co., 51.
 v. Porter, 201.
Pollasky v. Minchener, 318.
Pollock v. Gannt, 219.
Polly v. McCall, 224.
Pomfret v. Ricraft, 396.
Pond v. Merrifield, 201.
 v. Railroad Co., 226.
Pontiac v. Carter, 106.
Pontifex v. Midland Ry. Co., 21, 470.
Poole v. Huskinson, 396.
Pooler v. Reed, 260.
Poor v. Poor, 274.
 v. Sears, 131, 497.
Pope v. Boyle, 130.
 v. Pollock, 351, 352.
 v. U. S., 71.
Porter v. Dunn, 280.
 v. Hildebrand, 470.
 v. Thomas, 32.
Posnett v. Marble, 303.
Post v. Stockwell, 123.
Post Pub. Co. v. Hallam, 236, 296,
 307, 315, 323.
- Post Pub. Co. v. Moloney**, 298, 315, 316.
Potter v. Gjertsen, 350.
 v. Lambie, 384, 396.
 v. Metropolitan Dist. Ry. Co.,
 184.
 v. New York Cent. & H. E. R.
 Co., 525.
Potts v. Imlay, 351.
Potulni v. Saunders, 145, 241.
Powell v. Cheshire, 400.
 v. Fall, 459.
 v. Rees, 38, 183.
 v. Salisbury, 215.
 v. Sattler, 413.
Powell Duffryn Steam Coal Co. v.
 Taff Vale Ry. Co., 198.
Power v. Baker, 194.
Powers v. City of Council Bluffs, 227.
 v. Fowler, 333, 343, 344.
 v. Railroad Co., 514.
Powles v. Hilder, 139.
Powys v. Blgrave, 402.
Pratt v. Gardner, 74.
 v. Pioneer Press Co., 315.
 v. Pond, 236.
 v. Press Co., 239, 297, 301.
Pratt Coal & Iron Co. v. Brawley,
 502.
Prentiss v. Kent Furniture Manuf'g
 Co., 518.
 v. Shaw, 262.
Prescott v. Tousey, 285.
Press Co. v. Stewart, 308, 315.
Press Pub. Co. v. McDonald, 236, 306,
 323.
Preston v. Chicago & W. M. Ry. Co.,
 507.
 v. Grant, 179.
 v. Mercer, 383.
 v. Prather, 470.
Pretty v. Bickmore, 131.
Price v. Conway, 303.
 v. Harris, 123.
 v. Hewett, 99.
 v. Seeley, 250.
Priestley v. Fowler, 520.
Prime v. Eastwood, 295.
Primrose v. W. U. Tel. Co., 174.
Prindle v. Haight, 262.
Pritchard v. Hewitt, 240.
Probate Court v. Slason, 202.
Proctor v. Adams, 390, 391.

[The figures refer to pages.]

Proctor v. Harris, 428.
 v. Webster, 313.
 Proprietors of Maine Wharf v. Proprietors of Customhouse Wharf, 447.
 Proprietors of Quincy Canal v. Newcomb, 6, 60.
 Prosser v. Callis, 59, 295.
 Providence Ins. Co. v. Morse, 172.
 Prue v. New York, etc., R. Co., 46.
 Pullen v. Glidden, 355.
 Pulling v. Great Eastern Ry. Co., 184.
 Pullman v. Hill, 285, 286, 313.
 Pullman Palace-Car Co. v. Bales, 279.
 v. Barker, 209.
 v. Gavin, 140.
 v. Laack, 49, 510, 530.
 v. Matthews, 140.
 Pumpelly v. Canal Co., 106.
 v. Green Bay Co., 88.
 Pundman v. St. Charles Co., 108.
 Purcell v. St. Paul City Ry. Co., 219.
 v. Sowler, 314.
 Purdy v. Rome, W. & O. R. Co., 173.
 Purtell v. Jordan, 481.
 Putnam v. Payne, 92.
 v. Wyley, 113.
 Putney v. Day, 393.

Q

Quarman v. Burnett, 134.
 Quartz Hill Consol. G. Min. Co. v. Eyre, 351.
 Quested v. Newburyport & A. H. R. Co., 137.
 Quick v. Miller, 128.
 Quilty v. Pattie, 129.
 Quin v. Moore, 201, 473.
 Quinby v. Tribune Co., 320.
 Quinn v. Heisel, 250.
 v. New York, N. H. & H. R. Co., 187.
 v. Power, 145, 159.

R

Radcliff's Ex'rs v. Brooklyn, 87, 434.
 Radley v. London & N. W. R. Co., 495.
 v. Railroad Co., 493.

Ragon v. Toledo, A. A. & N. M. Ry. Co., 505, 514.
 Ragsdale v. Williams, 407.
 Railroad Co. v. Alabama, 70.
 v. Glover, 463.
 v. Hicks, 455.
 v. Hopkins, 458.
 v. Jones, 494.
 v. Kellogg, 49.
 v. Lockwood, 172, 174, 453.
 v. Reeves, 48, 216.
 v. Smith, 462.
 Railway Co. v. Ryan, 102.
 v. Spangler, 173.
 v. Valleley, 187.
 Rains v. Simpson, 76.
 Ramsden v. Boston & A. R. Co., 102.
 Ramsey v. Cheek, 34.
 Randall v. Evening News Ass'n, 303.
 v. Hamilton, 310.
 v. Hazelton, 55, 348.
 Randolph v. O'Riordon, 465, 500.
 Rankin v. Crane, 355, 356, 358.
 Ransom v. McCurley, 299, 307.
 v. State, 113.
 Ranson v. Kitner, 29.
 Rapho Tp. v. Moore, 109.
 Rapson v. Cubitt, 137, 139.
 Ratcliffe v. Evans, 59, 288, 295, 301.
 Rathbone v. New York Cent. & H. R. Co., 172, 175.
 Ravenga v. Mackintosh, 356, 357.
 Rawley v. Colliau, 530.
 Rawlings v. Till, 257.
 Rawstron v. Taylor, 426.
 Ray v. Tubbs, 96, 98.
 Raymond v. Bolles, 74.
 Rea v. Tucker, 239, 272, 276.
 Read v. Bishop of Lincoln, 9.
 v. Coker, 252, 253, 259.
 v. Hudson, 300.
 v. Railroad Co., 48.
 v. Spaulding, 48.
 Reader v. Purdy, 278.
 Reading v. Pennsylvania R. Co., 279.
 v. Royston, 388.
 Reagan v. Casey, 135.
 Reardon v. Thompson, 467.
 Rearick v. Wilcox, 316.
 Rector v. Smith, 310.
 Redding v. Wright, 346.
 Redgrave v. Hurd, 344.

[The figures refer to pages.]

- Redman v. Stowers, 358.
 Red River Line v. Cheatham, 464.
 Reed v. Chilson, 181.
 v. City of Madison, 105, 106.
 v. Conway, 74, 80.
 v. Harper, 100.
 v. Home Sav. Bank, 102.
 v. McRill, 414.
 v. Pennsylvania R. Co., 494.
 v. State, 226, 227.
 Reedie v. London & N. W. Ry. Co., 134.
 Reese River Silver Min. Co. v. Smith, 331.
 Reeve v. Dennett, 340, 343.
 v. Fox, 407.
 Reeves v. State, 7.
 Reg. v. Ashwell, 381.
 v. Jackson, 275.
 v. Kenrick, 367.
 v. Labouchere, 309.
 v. Lesley, 250.
 v. Parnell, 367.
 v. Peck, 367.
 v. St. George, 254.
 Regan v. Luthy, 399.
 Reid v. Evansville & T. H. R. Co., 48.
 v. Fairbanks, 417.
 v. Hood, 73.
 Reilly v. Philadelphia, 108.
 v. Thompson, 386.
 Reinke v. Bentley, 233.
 Reitan v. Goebel, 300.
 Reniham v. Wright, 10, 179.
 Renner v. Canfield, 221.
 Repka v. Sergeant, 200.
 Republican Pub. Co. v. Miner, 299, 322.
 v. Mosman, 321.
 Rerick v. Kern, 394.
 Respublica v. Sparhawk, 56, 57, 91.
 Restell v. Steward, 310.
 Reston v. Pomfret, 291.
 Retan v. Railway Co., 466.
 Reuck v. McGregor, 251.
 Rex v. Clerk, 288.
 v. Commissioners of Sewers of Pagham, 4.
 v. Creevey, 317.
 v. Fisher, 314.
 v. Pease, 87.
 v. Rosewell, 390, 445.
 Rex v. Seward, 367.
 v. Skinner, 310.
 v. Smith, 50, 429.
 v. Watson, 102.
 Reynolds v. Clarke, 14, 383.
 v. Everett, 198.
 v. Robinson, 280.
 Rhea v. Railroad Co., 55.
 Rhoda v. Annis, 153.
 Rhodes v. Dunbar, 434, 435.
 v. Otis, 394.
 v. Rodgers, 258.
 v. Whitehead, 445.
 Ricci v. Mueller, 128.
 Rice v. Boyer, 98, 99.
 v. Coolidge, 79, 80, 311.
 v. Manley, 19, 324, 363.
 v. Rice, 278.
 v. Yocum, 412.
 Rich v. Basterfield, 131, 132.
 v. New York Cent. & H. R. R. Co., 4, 18, 50, 221.
 Richards v. Torbert, 400.
 Richardson v. Anthony, 390.
 v. Atkinson, 413.
 v. Coal Co., 111.
 v. Pond, 382.
 v. Railroad Co., 461.
 v. Richardson, 414.
 v. Silvester, 340.
 v. Van Voorhies, 254.
 v. Vermont Cent. R. Co., 55, 86.
 Richlands Iron Co. v. Elkins, 516.
 Richmond v. Fisk, 252, 253, 255.
 Richmond's Case, 490.
 Richmond & D. R. Co. v. Dickey, 507.
 v. Greenwood, 235.
 v. Jones, 173.
 v. Mitchell, 529.
 v. Morley, 529.
 v. Walker, 178.
 Richter v. Harper, 451, 452.
 Ricker v. Freeman, 15.
 Riddle v. Brown, 393.
 v. McGinnis, 239.
 v. Proprietors of Locks & Canals 103.
 Ridenhour v. Railway Co., 231, 464.
 Ridgeley v. Bond, 113.
 Riding v. Smith, 324, 325.
 Riedel v. Moran, Fitzsimons & Co., 134, 135.

[The figures refer to pages.]

- Riley v. Lee, 59, 295.
 Ripley v. Case, 153.
 v. Yale, 385.
 Rippey v. State, 92.
 Risch v. Von Lillenthal, 342.
 Ritchie v. Sexton, 313.
 v. Stenius, 296.
 v. Waller, 159.
 Rives v. Wood, 357.
 Roach v. Garden, 288.
 Roadcap v. Sipe, 129.
 Robbins v. Chicago City, 135.
 v. Mount, 97.
 v. Robbins, 353.
 Roberge v. Winne, 196.
 Roberts v. City of Detroit, 105, 106,
 280.
 v. French, 346.
 v. Roberts, 290, 291.
 Robertson v. Parks, 336, 338.
 Robins v. Hope, 347.
 Robinson v. Baugh, 434.
 v. Goings, 236.
 v. Jones, 285.
 v. Lewis, 409.
 v. Railroad Co., 481.
 v. Rohr, 83.
 Robison v. Rupert, 262.
 Rochester White-Lead Co. v. City of
 Rochester, 78.
 Rockland Water Co. v. Tillson, 223.
 Rockwell v. Brown, 287.
 Rockwood v. Allen, 199, 206.
 v. Wilson, 88.
 Rodgers v. Central Pac. R. Co., 49.
 v. Lees, 114.
 Roe v. Railway Co., 41.
 Roettinger v. U. S., 71.
 Rogahn v. Foundry Co., 145, 159.
 Rogers v. Brooks, 385.
 v. Dutt, 50.
 v. Elliott, 435.
 v. Huie, 407.
 v. Leyden, 530.
 v. McDowell, 82.
 v. Marlboro Co., 81.
 v. Missouri, K. & T. Ry. Co., 176.
 v. Overton, 161.
 v. Stewart, 444.
 Rohan v. Sawin, 250.
 Rohe v. Railroad Co., 466.
 Rolin v. Steward, 202.
 Rollins v. Chalmers, 272.
 Rooney v. Sewall & Day Cordage
 Co., 515.
 Roope v. D'Avigdor, 8.
 Root v. King, 308.
 v. Lowndes, 223.
 v. New York & N. E. R. Co., 173.
 v. Stevenson's Adm'r, 98.
 Rose v. Belyea, 231.
 v. Miles, 438.
 Roseman v. Canovan, 344.
 Rosen v. Stein, 244.
 Rosenbaum v. St. Paul & D. R. Co.,
 114.
 Rosenfield v. Arrol, 486.
 Rosenkranz v. Haas, 251.
 Rosenthal v. Davenport, 82.
 v. Taylor, B. & H. Ry. Co., 448.
 Ross v. Hobson, 332.
 v. Johnson, 407.
 v. Leggett, 206, 231, 251.
 v. Madison, 108.
 v. Thompson, 202.
 Rossiter v. Minnesota Bradner-Smith
 Paper Co., 353.
 Rossman v. Adams, 401.
 Roswell v. Prior, 132, 133.
 Roth v. Smith, 252.
 Rothes v. Waterworks Com'rs, 87.
 Rothmiller v. Stein, 335.
 Rounds v. Railroad Co., 145, 303.
 Rouse v. Martin, 447.
 Routh v. Caron, 216.
 Rowbotham v. Jones, 442.
 Rowe v. Smith, 129.
 Rowell v. W. U. Tel. Co., 232.
 Rowen v. New York, N. H. & H. Ry.
 Co., 496.
 Rowers v. Thomas, 345.
 Rowning v. Goodchild, 80.
 Roy v. Goings, 356, 357.
 Royal Aquarium & S. & W. Garden
 Soc. v. Parkinson, 310, 311.
 Royston v. Railroad Co., 215, 221.
 Rucker v. Athens Manuf'g Co., 216.
 v. Smoke, 235.
 Rudd v. Darling, 75, 247.
 v. Rounds, 276.
 Rude v. Nass, 318, 319.
 Ruggles v. Lesure, 393, 394.
 Ruohs v. Backer's Next Friend, 311.
 Rushworth v. Taylor, 412.

[The figures refer to pages.]

Russell v. Bancroft, 444.
 v. Brown, 224, 227.
 v. Chambers, 267.
 v. Grimes, 81.
 v. Inhabitants of Devon Co., 109.
 v. McCall, 196.
 v. Mayor, etc., of City of New York, 57.
 v. Merchants' Bank of Lake City, 399.
 v. Minneapolis & St. L. R. Co., 517.
 v. Railway Co., 149.
 v. Richmond & D. R. Co., 515.
 v. Shenton, 131.
 v. Telegraph Co., 231.
 v. Tillotson, 519.
Russell & Co. v. Polk County Abstract Co., 190.
Russen v. Lucas, 246.
Ruter v. Foy, 300, 489.
Rutherford v. Holmes, 76.
Ruthven Woolen Manuf'g Co. v. Great Western R. Co., 216.
Ryalls v. Leader, 311.
Ryan v. Brewing Co., 371.
 v. Fralick, 268.
 v. New York Cent. Ry. Co., 44.
Ryburn v. Moore, 249.
Rychlicki v. City of St. Louis, 444.
Ryerson v. Ryerson, 275.
Rylands v. Fletcher, 55, 86, 430

S

Sabin v. Railroad Co., 87.
Safford v. Grout, 342.
Sagers v. Nuckolls, 144.
St. Anthony Falls Water-Power Co. v. Eastman, 457.
St. Clair Ry. Co. v. Eadle, 499.
St. Helen's Smelting Co. v. Tipping, 203, 421, 428, 435.
St. James Church v. Arrington, 447.
St. James Military Academy v. Gaiser, 301.
St. John v. American Mut. Fire Ins. Co., 46.
St. Louis, A. & C. R. Co. v. Dalby, 102.

St. Louis, A. & T. H. R. Co. v. Holman, 515.
St. Louis, A. & T. Ry. Co. v. Triplett, 507.
St. Louis Bridge Co. v. Miller, 490.
St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 48.
 v. Hackett, 150.
 v. Ledbetter, 452.
 v. Needham, 188.
St. Louis National Stock Yards v. Wiggins Ferry Co., 394.
St. Louis S. W. Ry. Co. v. Dobbins, 233.
 v. Jagerman, 512.
St. Louis & S. F. Ry. Co. v. Farr, 483.
St. Nicholas Bank v. State Nat. Bank, 163.
St. Paul, S. & T. F. R. Co. v. Sage, 191.
St. Peter v. Denison, 107.
Salado College v. Davis, 230.
Salisbury v. Green, 390.
 v. Herchenroder, 49, 478.
Salter v. Howard, 265, 363.
Salt Lake City v. Hollister, 102, 104.
Salt Springs Nat. Bank v. Wheeler, 407, 413.
Salvin v. Coal Co., 50.
Sampson v. Smith, 56.
 v. U. S., 71.
Samuel v. Judin, 14.
Samuels v. Evening Mail Ass'n, 102.
San Antonio & A. P. Ry. Co. v. Corley, 233.
 v. Peterson, 477.
Sanders v. Palmer, 358.
Sanderson v. Coal Co., 224.
 v. Haverstick, 413.
 v. Pennsylvania Coal Co., 433.
Sandford v. Handy, 336.
Sands v. Child, 164.
Sanford v. American Dist. Tel. Co., 140.
 v. Rowley, 303, 322.
Sanger v. Wood, 181.
Sarch v. Blackburn, 14.
Sargent v. ———, 268.
 v. Carnes, 258.
Sarles v. Sarles, 400.
Saulsbury v. Village of Ithaca, 106.

[The figures refer to pages.]

- Saunders v. Baxter, 313.
 Savacool v. Boughton, 81.
 Savage v. Everman, 179.
 v. Stevens, 332, 346.
 Savannah, F. & W. R. Co. v. Davis, 224.
 v. Holland, 236.
 v. Prichard, 216.
 Savannah & O. C. Co. v. Bourquin, 224.
 Savannah & W. R. Co. v. Phillips, 137.
 Savile v. Jardine, 294.
 Savill v. Roberts, 351.
 Savings Bank v. Ward, 82, 471, 473.
 Savings Bank of St. Paul v. Authier, 181.
 Sawyer v. Bennett, 310, 321.
 v. Corse, 84, 85.
 v. Davis, 440.
 v. Prickett, 338.
 v. Robertson, 404.
 v. Rutland & B. R. Co., 470.
 Saxon v. Castle, 62.
 Sayers v. Hoskinson, 400.
 Sayre v. Sayre, 238.
 Scammon v. City of Chicago, 135.
 Scanlon v. Wedger, 118.
 Scarborough v. Railway Co., 137.
 Schaefer v. Osterbrink, 156.
 Schaffner v. Ehrman, 240.
 Schable v. Railway Co., 466, 525.
 Schattgen v. Holnback, 350, 358.
 Scheer v. Keown, 249.
 Scheffel v. Weller, 387.
 Scheffer v. Railroad Co., 219, 221.
 Scheffler v. Minneapolis & St. L. Ry. Co., 116, 188.
 Schelter v. York, 56.
 Schenck v. Schenck, 285.
 Schild v. Legler, 297.
 Schillinger v. U. S., 70.
 Schimpf v. Sliter, 465.
 Schindler v. Milwaukee, L. & S. W. Ry. Co., 496.
 Schippel v. Norton, 230.
 Schlenks v. Central Pass. Ry. Co., 497.
 Schlichting v. Wintgen, 189.
 Schlitz Brewing Co. v. Compton, 27.
 Schmid v. Humphrey, 114.
 Schmidt v. Mitchell, 218, 219, 221.
 Schmitt v. Drouet, 83.
 Schmitz v. St. Louis, I. M. & S. Ry. Co., 233.
 Schmolze v. Chicago, M. & St. P. Ry. Co., 490.
 Schnebly v. Schnebly, 401.
 Schneider v. Heath, 334.
 Schnur v. Citizens' Traction Co., 501.
 v. Traction Co., 463.
 School Dist. v. Bragdon, 97.
 Schoonmaker v. Gilmore, 11.
 Schorn v. Berry, 276.
 Schrader v. Crawford, 221.
 Schroyer v. Lynch, 84.
 Schular v. Hudson River R. Co., 139.
 Schultz v. Byers, 423.
 v. Chicago & N. W. R. Co., 491.
 v. Schultz, 275.
 Schumaker v. Mather, 344, 347.
 v. St. Paul & D. R. Co., 208, 209.
 Schumann v. Torbett, 351.
 Schuneman v. Palmer, 277.
 Schuyler v. Curtis, 51.
 Schwabacker v. Riddle, 330, 332, 344, 347.
 Schweider v. Lang, 179.
 Schwenke v. Union Depot & R. Co., 260.
 Seidmore v. Smith, 265.
 Scott v. Hunter, 49.
 v. Kenton, 215.
 v. St. Louis, I. M. & S. R. Co., 241.
 v. Sampson, 322.
 v. Shepherd, 14, 44, 49, 57, 92.
 v. Stansfield, 310, 311.
 v. Watson, 97.
 Scotten v. Fegan, 83.
 Scott Tp. v. Montgomery, 206, 231.
 Scribner v. Beach, 254.
 Scroggin v. Wood, 335.
 Seaboard Manuf'g Co. v. Woodson, 506.
 Seagar v. Sligerland, 271.
 Seaman v. Netherclift, 310, 311.
 Seare v. Prentice, 20.
 Searing v. Saratoga, 117.
 Searls v. Vlets, 245.
 Sears v. Lyons, 234.
 Seaver v. Adams, 278.
 Secor v. Harris, 301.
 Sedalia Gaslight Co. v. Mercer, 55.
 Seeman v. Feeney, 234.
 Seldensparger v. Spear, 204.

[The figures refer to pages.]

- Seither v. Philadelphia Traction Co., 195.
 Selby v. Wilmington & W. R. Co., 175.
 Selden v. Cashman, 236.
 Selleck v. Lake Shore & M. S. Ry. Co., 46.
 Semayne's Case, 388, 389.
 Seneca R. Co. v. Auburn & R. R. Co., 15, 202.
 Serwe v. Northern Pac. R. Co., 22.
 Sessions v. Johnson, 193.
 Severance v. Judkins, 80.
 Severin v. Keppel, 411.
 Sewall v. Catlin, 300.
 Seward v. Vera Cruz, 186.
 Sewell v. City of St. Paul, 108.
 Seybolt v. New York, L. E. & W. R. Co., 483.
 v. Railroad Co., 482.
 Shadler v. Blair Co., 109.
 Shaeffer v. Sheppard, 280.
 Shanks v. Whitney, 336.
 Shanley v. Wells, 250.
 Shannon v. Burr, 202.
 Sharp v. Bonner, 451.
 v. Powell, 217.
 Sharrod v. London & N. W. R. Co., 145.
 Shattuc v. McArthur, 310.
 Shattuck v. Adams, 201.
 Shaw v. Chicago, R. I. & P. Ry. Co., 176.
 v. Coffin, 21, 100.
 v. Etheridge, 224.
 Shay v. Thompson, 119, 261.
 Shea v. Inhabitants of Milford, 403, 408.
 Sheahan v. Collins, 310.
 Sheckell v. Jackson, 315.
 Sheehan v. Flynn, 427.
 v. Sturges, 261.
 Sheffill v. Van Deusen, 59, 284, 286.
 Sheldon v. Davidson, 335-338, 342.
 Shepard v. Pratt, 417.
 Shephard v. Whitaker, 282, 284.
 Shepherd v. Lincoln, 85.
 Sheple v. Page, 32.
 Sherley v. Billings, 104, 151.
 Sherman v. Chicago, M. & St. P. Ry. Co., 507.
 v. Railroad Co., 224.
 Sherrill v. Connor, 398.
 Sherrod v. Langdon, 216.
 Sherry v. Perkins, 363, 375.
 Shields v. Yonge, 185.
 Shigley v. Snyder, 309.
 Shine v. Wilcox, 399.
 Shinnars v. Proprietors of Locks & Canals, 531.
 Shipley v. Fifty Associates, 458.
 Shippen v. Bowen, 31.
 Shippy v. Village of Au Sable, 501.
 Shirk v. Shultz, 99.
 Shirley v. Crabb, 393.
 Shoemaker v. Nesbit, 75.
 Shoenfeld v. Fleisher, 162.
 Shuffler v. Turner, 190.
 Shumacher v. Railroad Co., 452.
 Shurtleff v. Parker, 318.
 v. Stevens, 317.
 Shute v. Princeton Tp., 108.
 Sickles v. New Jersey Ice Co., 477.
 Sldener v. Russell, 354.
 Sleber v. Amunson, 178.
 Siemers v. Eisen, 478.
 Sikes v. Johnson, 97.
 Sillars v. Collier, 316.
 Silsbury v. McCoon, 417.
 Silver v. Martin, 165.
 Simmonds v. Holmes, 92.
 Simmons v. Brown, 128.
 v. Everson, 122, 187, 420, 444.
 v. Lillystone, 408, 413.
 v. Mitchell, 298.
 v. St. Paul & C. Ry. Co., 486.
 Simms v. Railroad Co., 464.
 Simons v. Burnham, 300, 306, 307, 321.
 v. Busby, 271.
 Simpson v. Grayson, 267.
 v. Hartopp, 198.
 v. New York Rubber Co., 477.
 v. Wright, 393.
 Sims v. American Steel Barge Co., 526.
 v. Everhardt, 99.
 Sinclair v. Slawson, 83.
 Siner v. Stearne, 145.
 Singer v. Bender, 14.
 Singer Manuf'g Co. v. Holdfodt, 235.
 v. King, 411, 412.
 v. Loog, 324.
 v. Rahn, 133, 148.
 v. Stillman, 409.
 Sioux Olty & P. R. Co. v. Stout, 464, 501.

[The figures refer to pages.]

- Sioux Nat. Bank v. Norfolk State Bank, 342.
 Sipple v. State, 70.
 Sir John Bourn's Case, 288.
 Sisson, Crocker & Co. v. Johnson, 198.
 Sitton v. MacDonald, 216.
 Six Carpenters' Case, 27, 389, 391, 392.
 Skelton v. Fenton Electric Light & Power Co., 135, 443.
 Skjeggerud v. Railway Co., 490.
 Skoglund v. Railway Co., 279.
 Skull v. Glenister, 395.
 Slater v. Mercereau, 122, 123.
 Slatten v. Des Moines Valley R. Co., 55, 86, 88.
 Slattery v. O'Connell, 502.
 Slaughter's Adm'r v. Gerson, 347.
 Slayton v. Fremont, E. & M. V. R. Co., 151.
 Sleath v. Wilson, 145.
 Sleight v. Ogle, 252.
 Slight v. Gutzlaff, 131.
 Sloan v. Edwards, 208.
 v. Schomaker, 360.
 Sloggy v. Dilworth, 444.
 Smith v. Benson, 394.
 v. Board of County Com'rs, 108.
 v. Boston & M. R. Co., 113.
 v. Brampston, 459.
 v. Buckecker, 309.
 v. Burrus, 352, 355.
 v. Carlson, 336.
 v. Chadwick, 348.
 v. Chicago, M. & St. P. Ry. Co., 485.
 v. City of Rochester, 107.
 v. Coe, 288.
 v. Cook, 461.
 v. Davenport, 97.
 v. District Township of Knox, 79.
 v. Faxon, 426.
 v. Green, 216.
 v. Higgins, 314.
 v. Hintrager, 351.
 v. Holcomb, 238.
 v. Holmes, 82, 474.
 v. Ingersoll-Sergeant Rock Drill Co., 56, 90.
 v. Johnson, 33.
 v. Jones, 243.
 v. King, 357.
 Smith v. Land & House Property Corp., 346.
 v. Lewis, 80.
 v. Lloyd, 382.
 v. London & S. W. Ry. Co., 441.
 v. Maben, 62, 358.
 v. McDowell, 428.
 v. Marrable, 335, 336.
 v. Masten, 271, 276.
 v. Master, 230.
 v. Mattingly, 398.
 v. Newsam, 253, 255.
 v. New York Cent. & H. R. R. Co., 151.
 v. New York & H. R. Co., 521.
 v. O'Donnell, 216.
 v. Packet Co., 159.
 v. People, 375.
 v. Philadelphia, 107.
 v. Railroad Co., 152, 233.
 v. Railway Co., 46.
 v. Reynolds, 146.
 v. Richards, 268, 337.
 v. Rodecap, 34.
 v. St. Paul & D. Ry. Co., 178.
 v. Simon, 119.
 v. Smith, 218, 275, 345.
 v. Spitz, 160.
 v. State, 245.
 v. Stewart, 59.
 v. Sun Printing & Pub. Ass'n, 59, 293.
 v. Thackerah, 52, 53, 203, 422.
 v. Thompson, 236.
 v. Webster, 379.
 v. Winona & St. P. R. Co., 515.
 v. Whittier, 463.
 v. Wood, 286, 406.
 v. Young, 412.
 Smiths v. McConathy, 421, 430.
 Smyth v. Carter, 401.
 Snider v. City of St. Paul, 107.
 Snow v. Carpenter, 237.
 v. Judson, 323.
 v. Wheeler, 368.
 Snyder v. Andrews, 285.
 v. Cabell, 431, 442.
 v. Snyder, 10.
 Sobleski v. St. Paul & D. R. Co., 178.
 Solms v. Lias, 448.
 Solomon v. Waas, 126.
 Soltau v. De Held, 435.

[The figures refer to pages.]

- Solverson v. Peterson, 294.
 Somerville v. Hawkins, 306, 319.
 Sorenson v. Dundas, 246.
 South v. Denniston, 268.
 Southard v. Minneapolis, St. P. & S. S. M. Ry. Co., 176.
 Southcote v. Stanley, 26, 131, 161, 468.
 Southern Bell Telephone & Telegraph Co. v. Constantine, 391.
 Southern Development Co. v. Silva, 335.
 Southerne v. Howe, 141, 334.
 Southern Exp. Co. v. Brown, 236.
 v. Selde, 175.
 Southern Kansas Ry. Co. v. Drake, 529.
 v. Rice, 206, 231.
 Southern Pac. Co. v. Ammons, 233.
 v. Lafferty, 508.
 v. Seley, 490.
 Southern R. Co. v. Kendrick, 237.
 South Royalton Bank v. Suffolk Bank, 432.
 Southwestern Tel. & Tel. Co. v. Robinson, 49, 462.
 Sowles v. Moore, 47.
 Spackman v. Foster, 410, 412, 416.
 Spalts v. Poundstone, 284, 285.
 Sparhawk v. Union Passenger R. Co., 421, 429.
 Spaulding v. Overmire, 83.
 v. Railway Co., 459.
 v. W. N. Flynt Granite Co., 491, 506.
 Spealman v. Missouri Pac. R. Co., 241.
 Spear v. Cummings, 273.
 v. Sweeney, 234.
 v. Tidball, 181.
 Spence v. Schultz, 136, 137.
 Spencer v. M'Gowen, 390.
 Spensley v. Lancashire Ins. Co., 260.
 Sperb v. Metropolitan El. Ry. Co., 87.
 Spicer v. South Boston Iron Co., 512.
 Spilman v. Navigation Co., 225.
 Spitze v. Baltimore & O. R. Co., 179.
 Spooner v. Holmes, 415, 416.
 v. Manchester, 407, 408.
 Spoor v. Spooner, 245.
 Sprights v. Hawley, 408.
 Spray v. Ammerman, 92.
 Sproat v. Directors, 111.
 Sproul v. Hemmingway, 183, 139.
 v. Pillsbury, 285.
 Stackman v. Chicago & N. W. Ry. Co., 491.
 Stacy v. Knickerbocker Ice Co., 47.
 v. Publishing Co., 236.
 Stadler v. Grieben, 224.
 Stafford v. City of Oskaloosa, 231.
 v. Morning Journal Ass'n, 323.
 Stahl v. Grover, 385.
 Stanley v. Gaylord, 379, 403.
 v. Powell, 31, 63, 256, 283.
 v. Union Depot R. Co., 48.
 Stanton v. Hart, 353.
 Staples v. Schmid, 150, 235.
 Starkweather v. Benjamin, 346.
 Starr v. Jackson, 384.
 State v. Armfield, 389.
 v. Armstrong, 285.
 v. Babcock, 123.
 v. Baltimore & O. R. Co., 178.
 v. Beck, 117.
 v. Bertheol, 431.
 v. Board of Education, 56.
 v. Boston & M. R. Co., 499.
 v. Bryson, 92.
 v. Buchanan, 375.
 v. Burnham, 72, 375.
 v. Burwell, 259.
 v. City of Mobile, 427.
 v. Cox, 242.
 v. Crow, 253, 254.
 v. Dalton, 82.
 v. Davis, 254.
 v. De Witt, 375.
 v. Dixon, 258.
 v. Donaldson, 375.
 v. Dooley, 390.
 v. Fleming, 437.
 v. Fox, 461, 473.
 v. Glidden, 367, 874, 375.
 v. Godfrey, 7, 254.
 v. Hastings, 74.
 v. Hoover, 264.
 v. Hunter, 244.
 v. Jones, 261.
 v. Jungling, 234.
 v. Knutson, 27.
 v. Lewis, 247, 250.
 v. Linkhaw, 429.
 v. Lonsdale, 318.
 v. Lunsford, 246.

[The figures refer to pages.]

- State v. McIntire, 285.
 v. Maine, 46.
 v. Mason, 281.
 v. Mayberry, 364.
 v. Mayor & Aldermen of Mobile, 447.
 v. Merritt, 253.
 v. Meyer, 83, 351.
 v. Middleham, 259.
 v. Millard, 431.
 v. Moore, 430.
 v. Norton, 375.
 v. Olympic Club, 119.
 v. Osborn, 292.
 v. Peacock, 259.
 v. Powell, 431.
 v. Reinhardt, 53.
 v. Rhodes, 274.
 v. Sears, 7.
 v. Shepard, 7.
 v. Smith, 7, 141.
 v. Stanley, 437.
 v. Stewart, 367, 374, 375.
 v. Tall, 8.
 v. Toole, 431.
 v. Torinus, 70.
 v. Vanderbilt, 261.
 v. Ward, 219.
 v. Wolever, 75, 76.
 State of New York v. U. S., 71.
 State of Wisconsin v. Torinus, 40.
 State T. I. Co. v. Harris, 16.
 Staton v. Norfolk & C. R. Co., 63.
 Steamship Co. v. Jolliffe, 16.
 Stearns v. Miller, 76.
 v. Sampson, 32, 256.
 Steel v. Kurtz, 188.
 v. Metcalf, 234.
 Steele v. Brannan, 314.
 v. Burkhardt, 478.
 v. Crabtree, 81.
 v. Schricker, 405.
 v. Southwick, 290, 300.
 Steen v. St. Paul & D. R. Co., 517.
 Steffenson v. Railway Co., 531.
 Steiner v. Clisby, 20.
 Steinhauser v. Spraul, 128, 514.
 Steinmetz v. Kelly, 258, 489.
 Stellwagen v. City of Winona, 463.
 Stephens v. Elwall, 164, 408.
 v. Myers, 252.
 v. Railroad Co., 231.
 Stephenson v. Little, 113.
 v. Wilson, 380.
 Sterger v. Van Sicklen, 130.
 v. Van Siclen, 131.
 Sterling v. Earden, 394.
 v. Jackson, 391.
 v. Warden, 394.
 Stern v. Katz, 294.
 Stetler v. Chicago & N. W. R. Co., 522.
 Stetson v. Faxon, 428, 448.
 Stevens v. Allen, 337.
 v. Armstrong, 139.
 v. Curtis, 407.
 v. Dudley, 220.
 v. Kelley, 33.
 v. Midland Counties Ry. Co., 355.
 v. Railway Co., 102.
 Stevenson v. Belknap, 270.
 v. Watson, 74.
 Steward v. Gromett, 353.
 v. Young, 324.
 Stewart v. Chadwick, 423.
 v. City of Ripon, 210.
 v. Gromett, 353.
 v. Minnesota Tribune Co., 298, 302.
 v. Pierce, 294.
 v. Ripon, 210, 233.
 v. Sonneborn, 356, 358.
 v. Southard, 74.
 v. Stearns, 333, 345, 346.
 v. Terre Haute & I. R. Co., 188.
 v. Tribune Co., 320.
 v. Wyoming Cattle Ranch Co., 334.
 Stiles v. Cardiff Steam Nav. Co., 103.
 v. Geesey, 493.
 v. Laird, 445.
 v. Tilford, 272.
 Stillson v. Hannibal & St. J. R. Co., 500.
 Stillwell v. Farewell, 413.
 Stilwell v. Barter, 309.
 Stimer v. Bryant, 357.
 Stimson v. Farnham, 203.
 Stitzell v. Reynolds, 302.
 Stock v. City of Boston, 468.
 Stockdale v. Hansard, 312.
 v. Onwhyn, 113.
 Stockley v. Hornidge, 355.
 Stockton v. Frey, 179.

[The figures refer to pages.]

- Stockwell v. U. S., 168.
 Stoddard v. Village of Saratoga Springs, 106, 107.
 Stodghill v. Railroad Co., 226, 227.
 Stone v. Codman, 219.
 v. Denny, 330, 331.
 v. Dickinson, 123, 193.
 v. Dry-Dock, E. B. & B. Ry. Co., 486.
 v. Evans, 279.
 v. Graves, 73.
 v. Knapp, 392.
 v. State, 70, 71, 458.
 Storey v. Early, 238.
 v. Wallace, 320.
 Storrs v. Barker, 338.
 Story v. Odin, 382.
 Story & I. Commercial Co. v. Story, 414.
 Stoudt v. Shepherd, 270, 272.
 Stout v. McAdams, 424.
 Stowe v. Heywood, 272, 277.
 Stowell v. Lincoln, 201.
 Strahlendorf v. Rosenthal, 510.
 Stratton v. Railroad Co., 482.
 Stringer v. Frost, 465.
 Stringham v. Stewart, 530.
 Strode v. Clement, 305, 313.
 Strong v. Campbell, 80.
 v. Iowa Cent. Ry. Co., 519.
 v. Strong, 181.
 Stuart v. Bell, 303, 313.
 Stuber v. McEntee, 177.
 Stumer v. Pitchman, 299.
 Stumps v. Kelley, 14.
 Sturges v. Keith, 407.
 v. Society, 135.
 Sturtevant v. Root, 302.
 Stutz v. Armour, 525.
 v. Chicago & N. W. R. Co., 233.
 Stuyvesant v. Wilcox, 259.
 Sullivan v. Fitchburg R. Co., 516.
 v. Hannibal & St. J. Ry. Co., 525.
 v. Mississippi & M. R. Co., 521.
 v. Murphy, 29.
 v. O'Hara, 397.
 v. Philadelphia & Reading R. Co., 235.
 v. Sullivan, 286.
 v. Tloga R. Co., 521, 522.
 v. Union Pac. R. Co., 185.
 v. Zelner, 423.
 Summerfield v. W. U. Tel. Co., 232.
 Sunderlin v. Bradstreet, 313, 318.
 Sunman v. Brewin, 309.
 Surocco v. Geary, 56, 91.
 Susquehanna Fertilizer Co. v. Malone, 432.
 Sutherland v. Ingalls, 142.
 Sutton v. Clarke, 84, 87.
 v. Huffman, 267.
 v. Johnstone, 358.
 v. McConnell, 356, 357.
 v. Wauwatosa, 46, 114, 208.
 Sweat v. Boston & A. R. Co., 511.
 Sweeny v. Old Colony & N. R. Co., 115.
 v. Railroad Co., 428, 467.
 Sweetland v. Stetson, 385.
 Sweetser v. Boston & M. R. Co., 117.
 Swett v. Cutts, 425, 426.
 Swift v. Chamberlain, 352.
 Swinfin v. Lowry, 215.
 Sykes v. Pawlet, 218.
 v. Sykes, 339.

T

- Taft v. New York, P. & B. R. Co., 390.
 Taggard v. Innes, 94.
 Talbott v. King, 437.
 Talley v. Courter, 492.
 Tally v. Ayres, 208, 451.
 Talmage v. Smith, 257.
 Tangney v. J. B. Wilson & Co., 510.
 Tanner v. Trustees of Village of Alblon, 434.
 Tapling v. Jones, 51.
 Tappan v. Powers, 366.
 Tarleton v. M'Gawley, 219.
 Tarpley v. Blabey, 320.
 Tarry v. Ashton, 157.
 v. Brown, 386.
 Tasker v. Stanley, 276, 277.
 Tate v. City of St. Paul, 106.
 v. Railroad Co., 446.
 Tatnall v. Courtney, 253.
 Tatton v. Wade, 19, 342.
 Taylor v. Bidwell, 32, 80.
 v. Clemson, 77.
 v. Cole, 383.
 v. Green, 129.
 v. Guest, 344.

[The figures refer to pages.]

- Taylor v. Jones** 392.
 v. Kneeland, 302.
 v. Lake Shore & M. S. R. Co., 475.
 v. Larkin, 182.
 v. Lyon, 412.
 v. Moore, 81, 82.
 v. Perkins, 301.
 v. Plymouth, 57.
 v. Railroad Co., 475.
 v. Rainbow, 29.
 v. Smith, 20.
 v. Strong, 250.
 v. Whitehead, 57, 391.
Taylor's Case, 350.
Teagarden v. Hetfield, 221.
Teall v. Felton, 84.
Temperton v. Russell, 362, 363, 365, 368, 371, 372, 376.
Tenant v. Goldwin, 37, 383.
Tenney v. Bank, 416.
 v. Harvey, 252.
 v. Smith, 246.
Terre Haute St. Ry. Co. v. Tappenbeck, 485.
Terre Haute & I. R. Co. v. Brunker, 52.
 v. Buck, 210, 220.
Terry v. Hutchinson, 272.
 v. Munger, 181, 196, 409.
Terwillinger v. Wands, 296.
Texas & P. R. Co. v. Cox, 65.
 v. Crow, 177.
 v. Morin, 273.
 v. Nelson, 181, 182.
 v. Patton, 505.
 v. Robertson, 188.
 v. Rogers, 515.
 v. Scoville, 151.
 v. Volk, 485.
 v. Williams, 158.
Thacher v. Moors, 410.
Thayer v. Boston, 108.
 v. Brooks, 225.
 v. Flint, 479.
Theroux v. Northern Pac. R. Co., 189.
Thibault v. Sessions, 299, 307, 309, 320, 322.
Thill v. Pohlman, 237.
Thom v. Bigland, 330.
 v. Pittard, 524.
Thomas v. Blasdale, 296, 299.
 v. Brackney, 204.
Thomas v. Brady, 113.
 v. Churton, 74.
 v. Cincinnati, N. O. & T. P. Ry. Co., 363.
 v. Cincinnati Ry. Co., 374.
 v. Joslin, 181.
 v. Quartermaine, 117, 477, 493.
 v. Railroad Co., 198.
 v. Railway Co., 461, 492.
 v. Rumsey, 193.
 v. Smith, 299.
 v. Winchester, 472.
Thompson v. Burhans, 381.
 v. Central Railroad & Banking Co., 531.
 v. Dashwood, 286.
 v. Dodge, 465.
 v. Gregory, 27.
 v. Halbert, 193.
 v. Improvement Co., 211.
 v. Jackson, 81.
 v. Libby, 170.
 v. Phoenix Ins. Co., 337.
 v. Pioneer Press Co., 308.
 v. Price, 353, 358.
 v. Railroad Co., 87.
 v. State, 81.
 v. Whipple, 76.
Thorley v. Lord Kerry, 292, 308.
Thorley's Cattle-Feed Co. v. Massam, 324.
Thornton v. Thornton, 33.
Thorogood v. Bryan, 497-499.
 v. Robinson, 403, 412.
Thorp v. Bradley, 201.
 v. Burling, 164.
Thouron v. Railway Co., 82.
Thrall v. Knapp, 262.
Thurber v. Sprague, 179.
Thurst v. West, 409.
Thurston v. Blanchard, 412.
 v. Hancock, 422.
Thyng v. Fitchburg R. R., 530.
Tice v. Munn, 210.
Tidman v. Ainslie, 322.
Tift v. Tift, 97.
Tightmeyer v. Mongold, 38.
Tillett v. Ward, 390, 460.
Tillotson v. Smith, 202.
Tillson v. Robbins, 294.
Timlin v. Standard Oil Co., 181.
Timothy v. Simpson, 250, 259.

[The figures refer to pages.]

- Tobias v. Harland, 325.
 v. Railroad Co., 461.
 Tobin v. Deal, 379, 407.
 v. Kirk, 11.
 v. Missouri Pac. Ry. Co., 501, 503.
 v. W. U. Tel. Co., 474.
 Todd v. Flight, 131, 132.
 v. Hawkins, 318.
 Toledo, A. A. & N. M. Ry. Co. v.
 Pennsylvania Co., 368, 371, 374.
 Toledo, St. L. & K. O. R. Co. v. Crit-
 tenden, 499.
 v. Loop, 391.
 Toledo, W. & W. R. Co. v. Grable, 500.
 v. Harmon, 151.
 v. O'Connor, 491.
 Tomle v. Hampton, 496.
 Tomlinson v. Warner, 351.
 Tompkins v. Sands, 78.
 Tonawanda R. Co. v. Munger, 114,
 115, 460.
 Toncray v. Dodge Co., 82.
 Toogood v. Spyring, 312.
 Torrance v. Third Nat. Bank, 64.
 Torriano v. Young, 398.
 Total v. Bonnefoy, 393.
 Totten v. Burhans, 331, 332, 336, 348.
 Tottenham v. Byrne, 386.
 Towne v. Wiley, 96, 98.
 Town of Troy v. Cheshire R. Co., 226,
 228.
 Townsend v. Briggs, 258.
 v. Hughes, 27, 240.
 Township of Buckeye v. Clark, 468.
 Township of Hutchinson v. Filk, 446.
 Toy v. United States Cartridge Co.,
 510.
 Trafford v. Adams Exp. Co., 188.
 Trammell v. Russellville, 249.
 Trask v. Shotwell, 115.
 Travis v. Barger, 271.
 v. Duffau, 216.
 v. Standard Life Acc. Ins. Co.,
 247.
 Traylor v. Horrall, 410.
 Treadwell v. Whittier, 483.
 Treasurer v. Cleary, 71.
 Trevillian v. Pyne, 386.
 Trogden v. Henn, 115.
 Trowbridge v. Brookline, 425.
 Trowbridge's Adm'r v. Danville
 Street-Car Co., 491.
- Troy & G. R. Co. v. Com., 70.
 Truesdell v. Combs, 76.
 Truman v. Railway Co., 55.
 Trust Co. v. Sedgwick, 127.
 Tryon v. Whitmarsh, 334.
 Tuberville v. Savage, 253.
 Tuck v. Downing, 335, 343.
 Tucker v. Cannon, 35.
 v. Jerris, 41.
 v. Newman, 435.
 v. White, 330.
 Tuff v. Warman, 493.
 Tullay v. Reed, 259.
 Tullidge v. Wade, 234.
 Tully v. Fitchburg R. Co., 201.
 Tunbridge Wells Dipper's Case, 204,
 383.
 Tunney v. Midland Ry. Co., 520.
 Turberville v. Stampe, 459.
 Turley v. Tucker, 113.
 Turner v. Estes, 276, 277.
 v. Page, 81.
 v. Phoenix Ins. Co., 40.
 v. Railroad Co., 112.
 Turner's Case, 56.
 Turpen v. Booth, 73, 75.
 Turpin v. Remy, 349, 360.
 Turrill v. Dolloway, 296.
 Turton v. New York Recorder Co.,
 320.
 Tuttle v. Chicago, R. I. & P. R. Co.,
 279.
 v. Church, 434.
 v. Detroit, G. H. & M. R. Co., 505.
 Tweed's Case, 83.
 Tweedy v. State, 258.
 Twist v. Railroad Co., 463.
 Twombly v. Monroe, 395.
 Twycross v. Grant, 184.
 Tyler, In re, 71.
 v. Savage, 104.
 v. W. U. Tel. Co., 232.
 Tyner v. Cory, 92.
- U.
- Ugla v. Railroad Co., 462.
 Ulbricht v. Eufaula Water Co., 202.
 Uline v. Railroad Co., 224, 226, 229.
 Underwood v. Hewson, 29.
 Union Mut. Life Ins. Co. v. Mowry,
 338.

[The figures refer to pages.]

- Union Pac. R. Co. v. Artist, 179.
 v. Callaghan, 47, 49.
 v. Fort, 518.
 v. Lapsley, 499.
 v. McDonald, 480, 502.
 v. Novak, 46.
 v. O'Brien, 515.
 v. Porter, 478.
 v. Tracy, 485.
 Union Railway & Transit Co. v. Shacklett, 193.
 Union Stock Yards Co. of Omaha v. Larson, 511.
 Union St. Ry. Co. v. Stone, 47.
 Union Trust Co. v. Cuppy, 225.
 United Land Co. v. Great Eastern Ry., 395.
 U. S. v. Alden, 56.
 v. Baxter, 42, 168, 417.
 v. Debs, 198.
 v. Harper, 7.
 v. Kirkpatrick, 69.
 v. Lee, 69, 70.
 v. North Bloomfield Gravel Min. Co., 55.
 v. Patterson, 374.
 v. Texas, 71.
 v. Trumbull, 72.
 v. Wingate, 417.
 v. Workingmen's Amalgamated Council, 374, 375.
 v. Yukers, 469.
 United States Exp. Co. v. Backman, 175.
 University v. Finch, 101.
 v. Tucker, 397, 399.
 Updegrove v. Pennsylvania S. V. R. Co., 117.
 v. Zimmerman, 310.
 Upjohn v. Board, 62, 420.
 Upton v. Levy, 343, 348.
 v. Tribilcock, 337.
 v. Upton, 301, 302.
 v. Vail, 363.
 Uransky v. Dry-Dock, E. B. & B. R. Co., 280.
- V
- Valentine v. Duff, 416.
 v. Kwilecki, 81.
 Vallery v. State, 317, 320.
 Vallo v. United States Exp. Co., 57.
 Van Ankin v. Westfall, 310.
 Van Bergen v. Van Bergen, 446.
 Van Bibber v. Hilton, 424.
 Vance v. Erie R. Co., 102.
 Vandenburgh v. Truax, 44, 210.
 Vanderbilt v. Mathis, 349, 358.
 Van Derveer v. Sutphin, 321.
 Van Deusen v. Young, 401, 402.
 Vandewater v. New York & N. E. R. Co., 478.
 v. Railroad Co., 466.
 Vanduzor v. Linderman, 62.
 Vane v. Barnard, 401.
 Van Hoosear v. Town of Wilton, 106.
 Van Hoozier v. Railroad Co., 225.
 Van Horn v. Van Horn, 283, 365, 371, 372, 377.
 Van Leuven v. Lyke, 382, 383, 461.
 Vann v. McCreary, 357.
 Vanneman v. Powers, 129.
 Van Norden v. Robinson, 63.
 Van Orsdol v. Railroad Co., 226.
 Van Pelt v. McGraw, 402.
 Van Rensselaer v. Dole, 59, 288, 298.
 Van Slyke v. Insurance Co., 77.
 Van Steenbergh v. Bigelow, 75.
 Van Tassell v. Hospital, 111.
 Van Vechten v. Hopkins, 302.
 Van Velsor v. Seeberger, 348.
 Van Winkle v. Wilkins, 216.
 Van Wyck v. Aspinwall, 312.
 Vasse v. Smith, 96, 98.
 Vaughan v. Menlove, 430, 459, 464.
 v. Railway Co., 88.
 v. Watt, 412.
 Vaughn v. Congdon, 76, 249.
 Vedder v. Hildreth, 216.
 Veghte v. Raritan, etc., Co., 394.
 Venables v. Smith, 139.
 Vennum v. Huston, 354.
 Verhein v. Schultz, 182.
 Verner v. Railroad Co., 452.
 Vernol v. Vernol, 343.
 Vicars v. Wilcocks, 219, 292, 326.
 Vick v. Railway Co., 149.
 Vickers v. Stoneman, 302.
 Victorian Railways Com'rs v. Coultas, 232.
 Victor Min. Co. v. Morning Star Min. Co., 423.
 Village of Carterville v. Cook, 49, 217.

[The figures refer to pages.]

Village of Dwight v. Hayes, 393.
Virginia v. Tennessee, 71.
Vittum v. Gilman, 184.
Vocht v. Kuklence, 128.
Vogel v. Gruaz, 312.
Volts v. Blackmar, 262.
Voorhis v. Olmstead, 153.
Vosburg v. Putney, 209, 257.
Vossel v. Cole, 267, 268.
Vossen v. Dautel, 57.
Vreeland v. Chicago, M. & St. P. Ry. Co., 492.

W

Wabash Ry. Co. v. Brown, 173.
Wabash, St. L. & P. R. Co. v. Farver, 135.
 v. Locke, 28, 61, 210.
 v. Rector, 237.
Wacek v. Frink, 82.
Wachsmuth v. Bank, 248.
 v. Martini, 333.
 v. Merchants' Nat. Bank, 102, 247.
Wachtel v. Noah Widows & O. B. Soc., 90.
Wade v. Tatton, 19.
Wadsworth v. Tillotson, 424.
Waggoner v. Jermaine, 419.
Wagner v. H. W. Jayne Chemical Co., 514.
 v. Saline Co. Progress Printing Co., 289.
Wahle v. Reinbach, 430.
Walte v. Northeastern Ry. Co., 500.
Wakefield v. Newport, 108.
Wakelin v. Railway Co., 482, 488.
Wakely v. Hart, 251.
Wakeman v. Dalley, 342.
 v. Robinson, 14, 379.
Walbert v. Trexler, 505.
Waldron v. Waldron, 278.
Wales v. Miner, 276.
Walker v. Cronin, 265, 362, 363, 365, 368, 371, 372.
 v. Cruikshank, 62.
 v. Fitts, 117.
 v. Hallock, 75.
 v. Johnson, 145.
 v. St. Paul City R. Co., 182.
 v. Wetherbee, 92.
Walkley v. Bostwick, 325.

Wall v. Trumbull, 75.
Wallace v. Canaday, 469.
 v. City & Suburban Ry. Co., 116.
 v. Morss, 97.
 v. New York, 236.
 v. Rodgers, 292.
Wallard v. Worthman, 379.
Waln v. Waln, 179.
Walsh v. Hall, 346.
 v. Mayor, etc., 79.
 v. Railway Co., 231.
 v. Trustees, 79, 85.
Walter v. Sample, 357.
 v. Selfe, 430.
Walton v. Booth, 473.
 v. Perkins, 325.
 v. U. S., 71.
Wandell v. Edwards, 272.
Ward v. Chicago, St. P., M. & O. Ry. Co., 112, 494.
 v. Clark, 298.
 v. Conatser, 94, 95.
 v. Freeman, 74.
 v. Hobbs, 6, 335, 336.
 v. Railroad Co., 462.
 v. State, 264.
 v. Taylor, 384.
 v. White, 262.
Warder v. Bowen, 342.
Warder, Bushnell & Glessner Co., v. Whitish, 346.
Ware v. Johnson, 381.
Warmington v. Atchison, T. & S. F. R. Co., 529.
Warmouth v. Cramer, 59.
Warner v. Chamberlain, 233.
 v. Press Pub. Co., 306.
 v. Riddiford, 246.
Warnock v. Mitchell, 284; 285.
Warre v. Calvert, 201.
Warren v. Englehart, 188.
 v. Warren, 278.
 v. Westrup, 123.
Wartman v. Swindell, 35, 202.
Washburn v. Insurance Co., 181.
Washington & G. R. Co. v. Gladmon, 488.
 v. Harmon's Adm'r, 485.
 v. McDade, 506.
Wason, Ex parte, 311.
 v. Walter, 312, 313.
Wasson v. Mitchell, 75, 85.

[The figures refer to pages.]

- Water Co. v. Ware, 135.
 Waterman v. Chicago & A. R. Co., 485.
 Waters v. Pioneer Fuel Co., 133.
 v. Towres, 216.
 Watkin v. Hall, 322.
 Watson v. Goodno, 406.
 v. McCarthy, 301.
 v. Railroad Co., 64, 181.
 v. Watson, 270, 352.
 Watters v. Smoot, 309.
 Watts v. Kelson, 395.
 Waverly Timber & Iron Co. v. St. Louis Cooperage Co., 408.
 Way v. Townsend, 77.
 Waycross Lumber Co. v. Guy, 486.
 Weare v. Fitchburg, 106.
 Weaver v. Devendorf, 73-75.
 v. Iselin, 274.
 v. Ritter, 291.
 v. Ward, 25, 29, 94, 257, 379.
 Webb v. Beavan, 298, 390.
 v. Gross, 202.
 v. Portland Manuf'g Co., 50, 54, 58, 200, 201, 204, 402, 424, 447.
 v. Railroad Co., 459.
 Webber v. Davis, 407.
 v. Quaw, 378.
 Weber v. Couch, 179.
 Webster v. Bailey, 342, 344.
 v. Fowler, 357.
 v. Hudson River R. Co., 49.
 Weckler v. First Nat. Bank, 103.
 Wedgewood v. Baily, 65.
 Weedon v. Timbrell, 276.
 Weeks v. Prescott, 219.
 Wehmann v. Minneapolis, St. P. & S. S. M. Ry. Co., 176.
 Welck v. Lander, 46.
 Weidner v. Rankin, 189.
 Well v. Altenhofen, 294.
 v. Israel, 360.
 Weiller v. Pennsylvania R. Co., 175.
 Weir v. Bell, 153, 329.
 Weiss v. Railroad Co., 482.
 Welch v. Durand, 25, 29, 231.
 v. Railroad Co., 230.
 v. Tribune Pub. Co., 287.
 v. Wesson, 112, 494.
 Weld v. Gaslight Co., 431.
 v. Oliver, 414.
 v. Proprietors of Side Booms, 103.
 Welfare v. London & B. Ry. Co., 131.
 v. Railroad Co., 458.
 Welker v. Butler, 295.
 Wellington v. Downer Kerosene Oil Co., 335, 459.
 v. Small, 374.
 v. Wentworth, 410.
 Wellman v. Sun Print. & Pub. Co., 288.
 Wells v. Abrahams, 8.
 v. Howell, 382.
 v. New Haven & Northampton Co., 226, 229.
 Welsh v. Cheek, 62.
 v. Parrish, 133.
 v. Wilson, 81, 388.
 Welty v. Indianapolis & V. R. Co., 100.
 Wendell v. Baxter, 110.
 v. Johnson, 383.
 Wenman v. Ash, 285.
 Wescott v. Fargo, 175.
 Wesson v. Washburn Iron Co., 434, 436, 438, 448.
 West v. Cabell, 249.
 v. Moore, 99.
 v. Railway, 445.
 v. Shockley, 41.
 v. Smallwood, 247, 350.
 Westaway v. Railway Co., 466.
 Westcott v. Middleton, 206, 231.
 Western Bank of Scotland v. Addie, 102.
 Western College v. Cleveland, 106.
 Western Counties Manure Co. v. Lawes Chemical Manure Co., 323, 325.
 Western Ry. of Alabama v. Mutch, 215.
 Western Stone Co. v. Whalen, 508.
 Western Transp. Co. v. Newhall, 174.
 W. U. Tel. Co. v. Hall, 233.
 v. James, 175.
 v. Linn, 173, 232.
 v. McGill, 188.
 v. Timmons, 469.
 v. Wood, 233.
 Westervelt v. Demarest, 337.
 Westlake v. Westlake, 278.
 Wetherbee v. Green, 417.
 Wetherhead v. Armitage, 294.
 Wetmore v. Mellinger, 351.

[The figures refer to pages.]

- Wetmore v. Tracy, 445.
 Whalley v. Pepper, 62.
 Wharf v. Roberts, 346.
 Whatman v. Pearson, 147, 149.
 Wheatland v. Pryor, 163.
 Wheatley v. Baugh, 425, 426.
 v. Chrisman, 424.
 Wheaton v. Beecher, 308, 316.
 Wheeler v. Berry, 515, 518.
 v. Lawson, 405.
 v. Oceanic Steam Nav. Co., 470.
 v. Randall, 216.
 Wheeler & Wilson Manuf'g Co. v. Jacobs, 98.
 Wheelock v. Wheelwright, 413.
 Whipple v. Cumberland Manuf'g Co., 58, 231.
 v. Fuller, 352.
 v. Walpole, 236.
 Whitaker v. Forbes, 64.
 Whitcomb v. Joslyn, 99.
 White v. Ballou, 220, 486.
 v. Barnes, 119.
 v. Brantley, 385.
 v. Carroll, 32, 310, 311.
 v. Duggan, 308.
 v. Jameson, 132.
 v. Kellogg, 261.
 v. McQueen, 251.
 v. Morse, 74.
 v. Mowbray, 347.
 v. Murtland, 267, 271, 272.
 v. Nellis, 268, 271.
 v. Nicholls, 292, 304, 312.
 v. Richmond & D. R. Co., 178.
 v. Ross, 276, 277.
 v. W. U. Tel. Co., 469.
 Whiteford v. Henthorn, 350.
 Whitehead v. Hellen, 27.
 v. Jessup, 357.
 Whitehouse v. Fellowes, 27, 191, 229.
 v. Railroad Co., 87.
 Whitenack v. Philadelphia & R. R. Co., 443.
 White Sewing-Mach. Co. v. Richter, 210.
 Whiteside v. U. S., 69.
 Whitfield v. Lord Le Despencer, 84.
 Whitford v. Panama R. Co., 186.
 Whiting v. Hill, 343.
 v. Johnson, 350.
 Whitmore v. Bischoff, 224.
 Whitney v. Allaire, 202.
 v. Backus, 122, 392.
 v. Bartholomew, 434.
 v. Clifford, 482.
 v. Dutch, 97.
 v. Preston, 82.
 Whittaker v. Bradley, 300.
 v. Collins, 22.
 Whittemore v. Cutter, 200.
 v. Oil Co., 195.
 Whyte v. Rysden, 2.
 Wichita & W. R. Co. v. Beebe, 222.
 Wickersham v. Orr, 394.
 Wickes v. Clutterbuck, 76.
 Widrig v. Oyer, 298.
 Wieland v. Kobick, 99.
 Wieman v. Mabee, 312.
 Wier v. Allen, 323.
 Wiers' Appeal, 434.
 Wiffin v. Kincard, 257.
 Wiggett v. Fox, 161.
 Wiggins v. Hathaway, 84, 85.
 Wilbur v. Turner, 122, 392.
 Wilcox v. Moon, 285, 286.
 v. Railroad Co., 231.
 Wild v. Mayor, etc., of City of Peter-son, 105.
 Wilde v. Gibson, 331.
 Wilds v. Layton, 400.
 v. Railroad Co., 481.
 Wiley v. Railroad Co., 212.
 Wilkes v. Jackson, 198.
 v. Market Co., 6.
 Wilkinson v. Drew, 236.
 v. Wilkinson, 401.
 Willard v. Holmes, Booth & Hay-dens, 240.
 v. Mellor, 285.
 Willey v. Carpenter, 119.
 v. Hunter, 448.
 v. Laraway, 399.
 Willi v. Lucas, 122.
 William Branfoot, The, 240.
 Williams v. Archer, 409.
 v. Davenport, 301.
 v. Davis, 347.
 v. Dickenson, 8.
 v. Edmunds, 112.
 v. Esling, 383.
 v. Fresno Canal & Irr. Co., 136.
 v. Fulmer, 424.
 v. Hays, 94, 95.

[The figures refer to pages.]

- Williams v. James, 395.
 v. Jones, 246, 257.
 v. McGrade, 387.
 v. Mercer, 82.
 v. Merle, 415.
 v. Morris, 390.
 v. Mostyn, 203.
 v. St. Louis & S. F. Ry. Co., 189.
 v. Sheldon, 122.
 v. Smith, 412.
 v. Spencer, 388, 390.
 v. Water Co., 225.
 v. The Welhaven, 72.
 Williams' Case, 60.
 Williamson v. Fischer, 393.
 v. Freer, 285.
 v. Louisville Industrial School of Reform, 79, 111.
 Williamsport & A. R. Co. v. Com., 71.
 Willard v. Willard, 401.
 Willingham v. King, 101.
 Willis v. City of Perry, 63, 426, 485.
 Willmet v. Harmer, 309.
 Willock v. Pennsylvania R. Co., 172.
 Willy v. Mulledy, 476.
 Wilmarth v. Burt, 247, 248.
 Wilson v. Brett, 453.
 v. Bumstead, 189.
 v. City of New Bedford, 457.
 v. City of New York, 106.
 v. City of Troy, 137.
 v. Dubois, 325.
 v. Garrard, 97.
 v. Haley Live-Stock Co., 384.
 v. Hoffman, 408.
 v. Jefferson Co., 109.
 v. McLaughlin, 407.
 v. Maltby, 402.
 v. The Mary, 56.
 v. Newport Dock Co., 215.
 v. Noonan, 292.
 v. Peverly, 85.
 v. Railroad Co., 393, 466.
 v. Reedy, 486.
 v. Shepler, 272.
 v. Smith, 15.
 v. Tuman, 40.
 v. Vaughn, 236.
 v. Young, 81.
 Wilt v. Welsh, 21, 99.
 Wiltse v. Town of Tilden, 187.
 Wimberly v. Thompson, 80.
 Winchester v. County Com'rs, 181.
 v. Stevens Point, 225.
 Windham v. Wither, 194.
 Windram v. French, 340, 343.
 Windsor v. McVeigh, 101.
 Winkler v. Railroad Co., 220.
 v. Roeder, 230.
 Winnebiddle v. Porterfield, 356.
 Winnegar's Adm'r v. Central Passenger Ry. Co., 184.
 Winner v. Oakland Tp., 280.
 Winship v. Neale, 113.
 Winslow v. Beal, 14.
 v. Stokes, 222.
 Winsmore v. Greenbank, 276, 277.
 Winstead v. Hulme, 230.
 Winterbottom v. Lord Derby, 60, 438.
 v. Wright, 161, 202, 471, 521.
 Winterburn v. Brooks, 56.
 Winters v. Kansas City Cable Ry. Co., 501.
 Wintz v. Morrison, 216.
 Wirt v. Dinan, 129.
 Wisconsin Cent. R. Co. v. Ross, 121, 123.
 Wiswell v. Doyle, 502.
 Withers v. Henley, 224, 244.
 Witt v. St. Paul & N. P. Ry. Co., 386.
 Wohlfahrt v. Beckert, 478.
 Wolcott v. Melick, 446.
 Wolf v. Bauerels, 280.
 v. Perryman, 246, 251.
 v. Wolf, 278.
 v. W. U. Tel. Co., 175.
 Wolfe v. Pearson, 43.
 v. Pugh, 153.
 Wolff Manuf'g Co. v. Wilson, 47.
 Womack v. Fudikar, 62, 357.
 Womersley v. Church, 425.
 Wood v. Graves, 361, 362.
 v. Lane, 246.
 v. Leadbitter, 393.
 v. McGrath, 447.
 v. Mathews, 276.
 v. Michigan Air-Line R. Co., 384.
 v. Noack, 414.
 v. Railway Co., 459, 486.
 v. Wand, 202, 424.
 v. Young, 190.
 Woodbury v. Thompson, 291.

[The figures refer to pages.]

Wooden v. Western N. Y. & P. R. Co.,
528.

Wooden-Ware Co. v. U. S., 408, 417.

Woodhouse v. Walker, 398.

Woodin v. Wentworth, 448.

Woodman v. Hubbard, 98.

Woodmansie v. Logan, 62.

Woodruff v. Bowen, 476.

v. Bradstreet Co., 296, 302, 318.

v. Halsey, 884.

Woods v. Pangburn, 198, 287.

v. Wiman, 285, 317.

Woodward v. Barnes, 127.

v. Glidden, 239.

v. Railway Co., 187.

v. Suydam, 43.

v. Washburn, 245, 360.

Woodworth v. Mills, 353, 356.

Woolenslagle v. Runals, 347.

Woolsey v. Trustees, 280.

Word v. Vance, 97, 99.

Worley v. Spurgeon, 146.

Wormsdorf v. Detroit City Ry. Co., 48.

Wormouth v. Cramer, 286.

Worthington v. Wade, 467.

Wren v. Welld, 325.

Wright v. City of St. Cloud, 455.

v. Clark, 83.

v. Defrees, 80.

v. Eaton, 42, 164.

v. Kerr, 126.

v. Leonard, 126.

v. Lothrop, 810, 812.

v. New York Cent. R. Co., 524.

v. Tileston, 181.

v. Wilcox, 121, 145.

v. Wilson, 244.

v. Woodgate, 318.

v. Wright, 181.

Wulstein v. Mohlman, 215, 221.

Wust v. Erie City Iron Works, 529.

Wyatt v. Buell, 811.

Wyllie v. Birch, 208.

Wyllie v. Palmer, 140, 147, 473.

Wyman v. Leavitt, 232.

Wymore v. Mahaska Co., 501.

Wynkoop v. Wynkoop, 10.

Wynne v. Parsons, 59, 293.

Y

Yale Gas Stove Co. v. Wilcox, 104.

Yarborough v. Bank of England, 102.

Yates v. Milwaukee, 106.

v. Squires, 149.

Yeager v. Wallace, 412.

Yeates v. Reed, 59, 95.

Yellowly v. Gower, 398.

Yelton v. Railroad Co., 178.

Yerex v. Elneder, 427.

Yertore v. Wiswall, 186.

Yoakum v. Dunn, 231.

v. Kroeger, 52.

Yocum v. Zahner, 241.

Yordy v. Marshall Co., 108.

Youl v. Harbottle, 408.

Young v. Bankier Distillery Co., 425.

v. City Council of Charleston, 109.

v. Clegg, 284, 285.

v. Hichens, 371.

v. Macrae, 324, 325.

v. Marshall, 20.

v. Miller, 298.

v. New Jersey & N. Y. Ry. Co.,
530.

v. South Boston Ice Co., 147.

v. W. U. Tel. Co., 175.

v. Young, 344.

Youngs v. Ransom, 9.

Yundt v. Hartrunft, 276.

Z

Zachary v. Pace, 412.

Zelinsky v. Price, 81.

Zell v. Dunkle, 20, 470.

Zeller v. Martin, 246.

Zemindar Case, 55, 457.

Zerfing v. Mourer, 271.

Zettel v. City of West Bend, 487.

Ziebarth v. Nye, 225.

Zier v. Hoffin, 296.

Zimmer v. New York Cent. & H. R.
R. Co., 175.

Zinn v. Rice, 351, 353, 361.

Zottman v. San Francisco, 40.

Zuckerman v. Sonnenschein, 808, 810,
818.

INDEX.

[THE FIGURES REFER TO PAGES.]

A

ABATEMENT,

- of nuisance by act of party, 445.
- by action, 446.

ABSTRACT CLERKS,

- liability of, 82.

ACTIONS,

- ex contractu and ex delicto, 11.
- forms of, 12.
- real, personal, or mixed, 12.
- trespass, 12.
- statute of Westminster II., 13.
- actions on the case, 13.
 - assumpsit, 13.
 - detinue, 13.
 - conversion, 13.
 - trespass on the case, 13.
- effect of abolishing forms of, 21.
- for public wrongs, special damage, 59.
- transitory actions, 64.
- cause of action as to time, 65.

ADJECTIVE LAW,

- of torts, 2, 5.
- torts and crimes distinguished, 5.
- in what courts torts are cognizable, 9.
- administration of the law of torts by courts of common law, 11.

ADULTERY,

- action by husband, 275.

ADVICE OF COUNSEL,

- as a defense in action for malicious prosecution, 357.

AGENTS,

- of legislature, liability, 72.

[The figures refer to pages.]

AGGRAVATION AND MITIGATION OF DAMAGES,
see "Damages."

AGREEMENT,

discharge or limitation of liability for torts by, 171.
before damage, validity, 171.
after damage, 176.

ALIEN ENEMIES,

right to sue in tort, 101.

ANIMALS,

liability for damage by, 459.

ANTICIPATION,

no duty to anticipate negligence, 492.

ARREST,

with and without warrants, 248.

ASSAULT AND BATTERY,

assault defined, 252.

threats do not constitute, 253.

apparent means of effecting attempt, 258.

battery defined, 254.

force and intent, 255.

force, 255.

fault or intention, 256.

defenses, 257.

justification, 257.

private defense of person, 257.

defense of family, servants, and friends, 258.

of property, 259.

commensurate defense, 259.

authority, 260.

mitigation, 261.

ASSUMPSIT,

waiver of tort and suit in, 20.

election to sue infant in, 99.

ASSUMPTION OF RISK,

see "Master and Servant."

AUTHORITY,

authorizing wrongs, landlord and tenant, 131.

as a defense in assault and battery, 260.

AUTHORIZED ACTS,

not actionable, 54.

unauthorized acts, 83.

[The figures refer to pages.]

AUTHORIZED ACTS—Continued,

exercise of statutory rights, 86.

abuse or excess of authority, 88.

liability of municipal corporation for unauthorized acts of agents or officers, 107.

legalized nuisance, 439.

AVOIDABLE CONSEQUENCES,

avoiding unnecessary damage after injury, 493.

B

BAILMENT,

does not create relation of master and servant, 139.

contract duty, negligence, 469.

BANK,

liability for negligence of correspondent, 163.

BOYCOTTS,

as actionable conspiracy, 366.

BURDEN OF PROOF,

to show negligence, 482.

burden of showing contributory negligence, 485.

C

CARRIERS,

right to contract against negligence, 172.

contract duty, negligence, 470.

CASE,

trespass on the case, 13.

trespass and case distinguished, 14.

CAUSE,

see "Damages."

connection as proximate cause, 43.

proximate cause defined, 44.

conspicuous antecedent, 45.

a question of fact, 46.

illustrations of proximate and remote causes, 47.

condition not a cause, 47.

proximate cause need not be sole cause, 48.

deceit as cause of damage, 342.

contributory negligence, connection as, 493.

CHARITIES,

public charities, liability for torts, 110.

[The figures refer to pages.]

CHILDREN,

liability for negligence, 465.

CIVIL DAMAGE ACTS,

damages under, 242.

CLERKS OF COURT,

liability of, 82.

COMMAND,

liability by reason of, see "Master and Servant."

COMMON EMPLOYMENT,

see "Master and Servant."

COMMON RIGHTS,

damage incident to exercise of, not actionable, 89.

COMPARATIVE NEGLIGENCE,

see "Negligence."

COMPENSATORY DAMAGES,

see "Damages."

CONDUCT AT PERIL,

when one acts at peril, 62.

CONFIDENTIAL RELATIONS,

privilege of communications in, 318.

CONSENT,

variations in right to sue based on, 24, 116.

liability by consent or command, 35.

of state to liability, 70.

volenti non fit injuria, 116.

leave and license, 116.

knowledge and option, 117.

limited by parties, 118.

by law, 118.

of owner or occupant as a defense to trespass, 392.

CONSEQUENTIAL DAMAGES,

see "Damages."

CONSIDERATION,

for discharge of liability, 178.

CONSPIRACY,

defined, 364.

injury the gist of the action, 365.

use of charge of conspiracy, 366.

strikes and boycotts, 366.

[The figures refer to pages.]

CONSTABLES,

liability of, 81.

CONTINUING TORTS,

or completed torts, 27.

CONTRACT,

express and implied, 15.

sued *ex delicto*, 19.

election of remedies against infant, 98.

discharge or limitation of liability for torts by, 171.

malicious interference with contract, 362.

contract duty, negligence, 468.

action by stranger for negligent breach, 471.

effect of limitations as to third persons, 474.

CONTRIBUTION,

between joint tort feasons, 124.

CONTRIBUTORY NEGLIGENCE,

see "Negligence."

burden of proof, 485.

CONVERSION,

see "Trover and Conversion."

CONVICTS,

right to sue, 101.

assumption of risk by, 519.

CORPORATIONS,

liability of private corporations for torts, 101.

ultra vires, 103.

scope of agents' or servants' authority, 104.

engaged in public work for profit, 109.

public charities, 110.

liability for exemplary damages, 235.

CORPSE,

property in, 9.

COURSE OF EMPLOYMENT,

see "Master and Servant."

COURT AND JURY,

function of, exemplary damages, 236.

aggravation and mitigation of damages, 237.

excessive and inadequate damages, 238.

in action for defamation, 297.

[The figures refer to pages.]

COURT AND JURY—Continued,

- in action for malicious prosecution, 858.
- negligent violation of statutory duty, 477.
- negligence, 480.

COURTS,

- in what courts torts are cognizable, 9.
- torts not recognized in divorce, ecclesiastical, or probate courts, 9.
- torts not recognized by courts of admiralty, 10.
- torts not recognized in courts of equity, 11.

CRIMES,

- distinguished from torts, 5.
- mental attitude of wrongdoer, 7.
- remedy, 8.

CRIMINAL CONVERSATION,

- action by husband, 275.

CUSTOM,

- care with reference to, 464.

D

DAMAGES,

- an essential element of legal wrongs, 50, 52.
- for torts, 197, 199.
- nominal damages, 199.
 - de minimis non curat lex, 199.
 - maxim explained, 202.
 - establish rights, 204.
- compensatory damages, 205.
 - compensation, not restitution, the proper test, 205.
 - when a question of law, 206.
- proximate and remote consequences, 207.
- direct and consequential losses, 208.
 - consequential losses, 210.
 - proximate and remote consequential losses, 210.
 - consequential losses in general, 211.
 - illustrations of proximate and remote consequences, 217.
 - anticipation of consequences, 220.
- entirety of demand, 222.
- past and future losses, 223.
- repetition of wrong, 223.
- continuing torts and breaches of contract, 223.
 - illustrations, 224.
- for continuing trespasses and nuisances, 224.
- damage caused by permanent structure, 225.

[The figures refer to pages.]

DAMAGES—Continued,

- continuing trespasses and nuisances, 225.
- elements of damage, 229.
 - pecuniary loss, 230.
 - physical pain and inconvenience, 231.
 - mental suffering, 231.
- exemplary damages, 234.
 - who liable, 235.
 - matters of practice, 236.
- aggravation and mitigation of damages, 237.
- excessive and inadequate damages, 238.
- statutory changes, 241.
 - extent of recovery, 241.
 - double and treble damages, 241.
 - for death by wrongful act, 241.
 - civil damage acts, 242.
- mitigation of, for assault and battery, 261.
 - in actions for defamation, 320.
- for injuries to child, see "Parent and Child."
- exemplary damages for injuries to child, 269.
- as the gist of libel and slander, 289.
- special damages in action for slander of title or property, 325.
- the gist of deceit, 347.
- are the gist of action for malicious prosecution, 359.
- in action for trespass, 396.
- for waste, 402.
- for conversion, 416.
- special damages for conversion, 418.
- exemplary damages for conversion, 418.
- as the gist of nuisance, 434.
- for nuisance, 448.
- the gist of actions for negligence, 487.

DAMNUM ABSQUE INJURIA,

- maxim applied and explained, 51.
- damages incident to authorized acts, 54, 89.

DANGEROUS INSTRUMENTALITIES,

- see "Negligence."

DEATH,

- discharge of liability for torts by, 183.
- actio personalis moritur cum persona, 183.
- action for death by wrongful act, 184, 186.
- Lord Campbell's Act, 186.

[The figures refer to pages.]

DEATH BY WRONGFUL ACT,

- action for, 186.
- damages for, 241.

DECEIT,

- defined, 328.
- the wrongful conduct of defendant, 328.
- the fraudulent intent, 329.
 - false statement with knowledge, 330.
 - false statement without knowledge or belief in truth, 330.
 - false statements without knowledge, but with negligence, 331.
 - the English rule, 331.
 - the American rule, 331.
- false representations, 333.
- express misrepresentation, 333.
- implied misrepresentation, 334.
- assertion of falsehood or suppression of truth, 334.
- expression of opinion, 335.
- representations of law, 337.
- promise, 338.
- inducing acts on plaintiff's behalf, 339.
 - with respect to other specified persons, 340.
 - with respect to party making statement, 241.
- conduct of plaintiff, 342.
- connection as cause, 342.
- plaintiff must have been deceived, 342.
- reliance on representations, 343.
- materiality of representations, 344.
- conduct of plaintiff as a bar to relief, 315.
- contributory negligence, 345.
- damages, 347.

DEFAMATION,

- publication of blasphemous words, 10.
- defamation defined, 281.
- slander of property or title, 281.
- libel, slander, and malicious prosecution distinguished, 282.
- publication, 282.
 - what constitutes, 284.
 - the giving out, 284.
 - the taking in by third persons, 286.
- republication, 286.
- application to plaintiff, 287.
 - personal application, 287.
 - disparaging sense, 288.

[The figures refer to pages.]

DEFAMATION—Continued,

- damage as the gist of libel and slander, 289.
- presumption in action for slander, 290.
 - damages presumed, 290.
 - special injury, nominal damages, 290.
 - pecuniary loss, 290.
 - proximate or remote damages, 291.
- presumption in action for libel, damages presumed, 293.
 - words defamatory per se in libel, but not in slander, 294.
 - special injury in libel, 295.
 - mental suffering, 295.
- construction of language used, 296.
- function of court and jury, 297.
- signification of words, 297.
- innocent words, 297.
- words defamatory per se, imputing a crime, 298.
 - New York rule, 298.
 - General American rule, 297.
 - words injurious to calling, 299.
 - contagious disease, 301.
 - words tending to disherison, 302.
- ambiguous words, 302.
- malice, 303.
 - malice which must be proved, 305.
 - actual malice, 306.
- statutory defenses, 307.
- common-law defenses, 308.
 - justification, 308.
 - truth as a justification, 308.
 - privilege as a justification, 310.
 - absolute privilege, judicial, 310.
 - legislative, 311.
 - official communications, 312.
 - qualified privilege, 312.
 - fair report, 313.
 - reports of judicial proceedings, 313.
 - reports of public meetings, 314.
 - fair comment and criticism, books, 314.
 - comment and criticism, 315.
 - public duties, 316.
 - religious and fraternal organizations, 317.
 - commercial communications, 317.

[The figures refer to pages.]

DEFAMATION—Continued,

communications in confidential relations, 317.
master as to servant, 319.

mitigation, 320.

provocation, 320.

common-law retraction, 320.

honest belief, rumors, 321.

plaintiff's character and position, 322.

slander of title or property, 323.

falsity of statement, 324.

malice, 325.

special damages, 325.

DEFENSES,

see "Self-Defense."

authorized conduct not actionable, 54.

variations in right to sue, 69.

discharge and limitation of liability for torts, 169.

in action for false imprisonment, 247.

in action for assault and battery, 257.

for defamation, 307.

of trespass, 388.

DEMAND,

necessity, to show conversion, 411.

DE MINIMIS NON CURAT LEX,

does not prohibit nominal damages, 199.

maxim explained, 202.

DISCHARGE,

of liability for torts, 169.

by voluntary act of party, 169.

by waiver, 170.

by agreement, 171.

by agreement before damage, 171.

liberty of contract, 171.

by agreement after damage, 176.

form of agreement, 176.

parties, 177.

consideration, 178.

intent to discharge wrong in issue, 179.

by operation of law, 180.

discharge by judgment, 180.

reason, 180.

[The figures refer to pages.]

DISCHARGE—Continued,

- identity of parties and cause of action, 181.
- final judgment on the merits, 182.
- discharge by death, 183.
- Lord Campbell's Act, 186.
- statutory action, 186.
- statute of limitations, 189.
- compliance with statutory requirements, 191.
- of joint torts, judgment, 192.
- the English rule, 192.
- The American rule, 192, 193.
- judgment does not divest property, 194.
- release, 195.
- waiver, 195.

DISCIPLINARY POWERS,

- liability for exercise of, 90.

DISTRICT TELEGRAPH COMPANY,

- messenger, as agent of company, 140.

DRUNKARDS,

- liability for torts, 100.

E

EASEMENT,

- or special property as a defense to trespass, 395.

ELECTION OF REMEDIES,

- tort or contract, 98.
- tort or contract against infant, 98.
- bailment to infant, 98.
- fraud, 99.
- election to sue in assumpsit, 20.

ESTOPPEL,

- liability by reason of, 37.

EVIDENCE,

- in mitigation of damages, 237.
- for false imprisonment, 251.
- for defamation, 320.
- of malice in action for defamation, 306.
- of negligence, 486.

EXCESSIVE DAMAGES,

- see "Damages."

EXEMPLARY DAMAGES,

- see "Damages."

[The figures refer to pages.]

EXEMPTION,

from liability for tort, general and special exemptions, 24.

based on privilege of actor, 68.

public acts, acts of state, 69.

exemption in general, 69.

consent to liability, 70.

exemption of United States, 70.

exemption of the various states, 71.

exemption of foreign powers, 71.

conduct of legislators, 72.

conduct of judicial officer, 72.

conduct within jurisdiction, 73.

judicial officers de jure or de facto, 74.

reason, 75.

judges of courts of record and of inferior courts, 76.

of judges as to ministerial acts, 77.

of judges in absence of jurisdiction, 77.

of executive officers, violation of purely public duties, 78.

the exemption applies generally to persons engaged in judicial proceedings, 79.

violation of private duties, 80.

special injury, 80.

liability of sheriffs, constables, etc., 81.

liability of other officers, 82.

unauthorized acts, 83.

liability of public officers for wrongs of subordinates, 83.

private acts, 86.

exercise of statutory rights, 86.

abuse or excess of authority, 88.

exercise of common-law rights, 89.

common rights, 89.

use of property, 89.

disciplinary powers, 90.

rights of necessity, 91.

right of private defense, 91.

variations based on status, 93.

insane persons, 93.

absolute liability, 93.

qualified liability, 94.

infancy, 96.

ordinarily no defense, 96.

tenderness of age of defendant, 97.

election of remedies, tort or contract, 98.

[The figures refer to pages.]

EXEMPTION—Continued,

- bailment, 98.
- fraud, 99.
- election to sue in assumpsit, 99.
- drunkards, 100.
- convicts, 101.
- alien enemies, 101.
- private corporations, 101.
 - ultra vires, 103.
- scope of agents' or servants' authority, 104.
- municipal and quasi municipal corporations, 105.
 - acts in performance of governmental functions, 105.
 - conduct ultra vires, 107.
 - authorized acts of agents and officers, 107.
 - damage incident to authorized acts, 108.
- involuntary quasi municipal corporations, 108.
- corporations not municipal engaged in public work, 109.
 - public works engaged in for profit, 109.
 - public charity, 110.
- variations based on conduct of plaintiff, 111.
 - wrongdoing by plaintiff, 111.
 - wanton injury, 114.
 - negligent injury, 115.
- consent by plaintiff, 116.
 - knowledge and option, 117.
 - consent limited by parties, 118.
 - by law, 118.

EXPERT OPINION EVIDENCE,

- of negligence, 486.

EXPLOSIVES,

- liability for damages by, 459.

F

FALSE IMPRISONMENT,

- defined, 243.
- legality of restraint, 243.
- sufficiency of restraint, 244.
- trespass, not case, the remedy for, 244.
- who liable for, 246.
- defenses, 247.
 - justification, 247.
 - arrest under judicial warrant, 248.
 - arrest without warrant, 249.

[The figures refer to pages.]

FALSE IMPRISONMENT—Continued,

mitigation, 251.

absence of malice admissible in mitigation, 251.

distinguished from malicious prosecution, 359.

distinguished from malicious abuse of process, 361.

FALSE REPRESENTATIONS,

see "Deceit."

FAMILY,

the family at common law, 263.

FELONY,

trespass merged in, 8.

FIRE,

liability for damage by, 458.

FORBIDDEN CONDUCT,

actionable without proof of damage, 57.

public wrongs, special damage, 59.

FORCIBLE ENTRY,

damages for, 395.

FRAUD,

liability of infant, election of remedies, 99.

liability of master for fraud of agent or servant, 152.

FRIGHT,

unaccompanied by physical harm, not actionable, 52.

H

HIGHWAYS,

nuisance on, 427.

care in passing vehicles, 465.

interference with, 466.

HUSBAND AND WIFE,

action for tort to wife, 23.

liability at common law for torts of wife, 125.

coverture as a defense to actions in form ex delicto, 126.

statutory duties, 127.

general effect of American statutes, torts committed by wife, 127.

torts committed against wife, 129.

torts as between husband and wife, 129.

actions between, 274.

actions for interference with domestic rights, 275.

action for defilement of wife, 275.

[The figures refer to pages.]

HUSBAND AND WIFE—Continued,

- action by husband for alienation of wife's affections, 276.
- per quod actions, 276.
- action by husband for miscellaneous wrongs, 277.
- action by wife for enticement of husband, 277.
- injuries to wife double cause of action, 278.
- parties, 279.

1

INADEQUATE DAMAGES,

- see "Damages."

INCONVENIENCE,

- as element of damage, 231.

INDEPENDENT CONTRACTOR,

- defined, 183.
- liability for torts, 183.
 - negligence in selection, 185.
 - interference with or acceptance of work, 185.
 - liability when thing contracted to be done is tortious, 186.
 - liability for breach of absolute duty, 186.
 - liability for acts of subcontractor, 187.

INFANTS,

- action by guardian, 23.
- liability for torts, 96.
- cannot ratify tort of another, 96.
- infancy ordinarily no defense, 96.
- tenderness of age as defense, 97.
- authority of parent no excuse, 97.
- liability of parent, 97.

INJUNCTION,

- as a remedy for trespass, 396.
- against waste, 402.

INJURIA SINE DAMNO,

- maxim explained, 51.

INSANE PERSON,

- action by guardian, 23.
- liability for torts, 93.
- absolute liability, 93.
- qualified liability, 94.
- liability for negligence, 463.

INSTRUMENTALITIES,

- liability by reason of, 36.

[The figures refer to pages.]

INSULT,

not actionable, 52.

INTENTION,

see "Mental Attitude."

INTOXICATING LIQUORS,

liquor nuisance, 437.

INVITED PERSONS,

duty to, negligence, 467.

J**JOINT TORT FEASORS,**

concert in action, 120.

who are, 120.

liability of, 123.

contribution between, 124.

JUDICIAL OFFICERS,

liability for acts of subordinates, 84.

JUDGMENT,

discharge of liability for torts by, 180.

reason, 180.

identity of parties and cause of action, 181.

final judgment on the merits, 182.

discharge of joint torts by, 192.

the English rule, 192.

the American rule, 192, 193.

divesting property, 194.

JURISDICTION,

liability of judges in absence of, 77.

K**KNOWLEDGE,**

care with reference to, 462.

L**LANDLORD AND TENANT,**

liability for torts, 130.

contract to repair, 130.

letting premises in ruinous condition or state of nuisance, authorizing wrongs, 131.

liability of landlord to tenant, 132.

trespass between, 385.

[The figures refer to pages.]

LATERAL SUPPORT,

interference with, nuisance, 422.

LEAVE AND LICENSE,

volenti non fit injuria, 116.

as a defense in assault and battery, 261.

LEGISLATORS,

exemption from liability, 72.

LEX LOCI,

determines wrongfulness of conduct, 64.

LIABILITY,

why liability attaches, 28.

absolute liability, 28.

theory of culpability, 30.

true theory, 31.

unintentional torts, 32.

intentional or malicious torts, 34.

by consent or command, 35.

may attach in five ways, 35.

by personal commission, 35.

by consent or command, 35.

by relationship, 36.

by instrumentality, 36.

by conduct operating as an estoppel, 37.

by ratification, 40.

dependent on connection as cause, 43.

LIABILITY FOR TORTS COMMITTED BY OR WITH OTHERS,

concert in action, joint tortfeasors, 120.

liability of joint tortfeasors, 123.

contribution between joint tortfeasors, 124.

relationship, 125.

husband and wife, 125.

liability at common law for torts of wife, 125.

coverture as a defense to actions in form ex delicto, 126.

general effect of American statutes, torts committed by wife, 127.

torts committed against wife, 129.

torts between husband and wife, 127.

landlord and tenant, 130.

contract of, 130.

letting premises in ruinous condition, authorizing wrongs, 131.

liability of landlord to tenant, 132.

[The figures refer to pages.]

LIABILITY FOR TORTS COMMITTED BY OR WITH OTHERS—Cont'd,
 independent contractor, 133.

negligence in selection, interference with or acceptance of work, 135.

liability where thing contracted to be done is tortious, 136.

liability for breach of absolute duty, 136.

liability for acts of subcontractor, 137.

master and servant, 138.

master's liability to third persons, 138.

existence of relation, 139.

liability by consent, 141.

torts authorized or adopted, 141.

injurious conduct commanded, 142.

liability independent of consent, 143.

(a) the servant's conduct, 143.

particular command as a test of liability, 143.

general or implied command as a test, 144.

scope of authority as a test, 144.

includes excessive or mistaken execution of authority, 145.

includes liability for forbidden conduct, 145.

course of employment as a test, 146.

general meaning of course of employment, 147.

authority of master not the test of liability, 148.

hours of employment not an unfailing or exclusive test of
 liability, 149.

(b) the master's duty, 149.

contractual or conventional duties, 149.

duty as to instrumentalities, conduct of servants, 151.

strangers and volunteers, 152.

liability in case of fraud, 152.

reason of liability, 154.

the master an insurer against torts, not against damage,
 157.

connection as cause, 157.

independent tort, 158.

master's liability to servant, 161.

servant's liability to servant, 162.

servant's liability to master, 162.

agent's liability for torts of subagent, 163.

liability of servant to third persons, 164.

liability for misfeasance and malfeasance, 164.

liability for nonfeasance, 165.

partners, 167.

[The figures refer to pages.]

LIBEL,

see "Defamation."

LICENSE,

abuse of, trespass ab initio, 391.

revocation of, 393.

coupled with an interest, 393.

care with reference to, 463.

duty to licensees, negligence, 467.

LIGHT AND AIR,

interference with, nuisance, 422.

LIMITATION,

of liability, see "Discharge."

LIMITATIONS, STATUTE OF,

see "Statutes of Limitation."

LUNATICS,

liability for negligence, 463.

M

MALFEASANCE,

see "Misfeasance."

MALICE,

intentional or malicious torts, 34.

malicious conduct, when actionable, 61.

liability of judges for malicious conduct, 76.

absence of, in mitigation of damages for false imprisonment, 251.

in actions for defamation, 303.

in action for slander of title or property, 325.

malicious wrongs, 327.

malicious wrongs in general, 327.

deceit, 328.

malicious prosecution, 349.

in action for malicious prosecution, 354.

malicious abuse of process, 360.

malicious interference with contract, 362.

conspiracy, 364.

MALICIOUS ABUSE OF PROCESS,

when actionable, 361.

distinguished from malicious prosecution, 361.

MALICIOUS INTERFERENCE WITH CONTRACT,

when actionable, 362.

[The figures refer to pages.]

MALICIOUS PROSECUTION,

- elements of wrong, 349.
- the judicial proceeding, 349.
- what judicial proceedings are sufficient, 350.
- termination of proceeding, 352.
- success of plaintiff, 352.
- parties to proceeding, 354.
- malice and want of probable cause, 354.
- inference from conviction, acquittal, or dismissal, 355.
- honest belief, 356.
- advice of counsel, 357.
- concurrence of malice and want of probable cause, 357.
- province of court and jury, 358.
- damages, 359.
- distinguished from false imprisonment, 359.
- distinguished from malicious abuse of process, 361.

MARITIME TORTS,

- cognizable in courts of admiralty, 10.

MASTER AND SERVANT,

- liability for torts, 138.
- master's liability to third persons, 138.
 - how attaches, 138.
 - existence of relation, 139.
 - respondeat superior.
 - bailment does not create relation, 139.
 - servant may be lent for particular employment, 140.
 - liability by consent, 141.
 - torts authorized or adopted, 141.
 - injurious conduct commanded, 142.
 - liability independent of consent, 143.
 - particular command as a test of liability, 143.
 - general or implied command as a test of liability, 144.
 - scope of authority as a test of liability, 144.
 - includes excessive or mistaken execution of authority, 145.
 - includes liability for forbidden contract, 145.
 - course of employment as a test, 146
 - general meaning of course of employment, 147.
 - authority of master not a test of liability, 148.
 - hours of employment not an unfailing or exclusive test of liability, 146.
 - contractual or conventional duties of master, 149.

[The figures refer to pages.]

MASTER AND SERVANT—Continued,

- duty as to instrumentalities, conduct of servants, 151.
- strangers and volunteers, 152.
- liability in case of fraud, 152.
- reason of liability, 154.
- duties, 156.
- the master an insurer against torts, not against damage, 157.
- connection as cause, 157.
- independent tort, liability of master, 158.
- master's liability to servant, 161.
- servant's liability to servant, 161.
- servant's liability to master, 162.
- agent's liability for torts of subagent, 163.
- servant's liability to third persons, 164.
- liability for misfeasance and malfeasance, 164.
- liability for nonfeasance, 165.
- right to contract against liability for negligence, 173.
- master's liability for exemplary damages, 236.
- damage for interference with relationship, 264.
- nature of injury, 264.
- for what wrong the action lies, 264.
- damages for loss of service, 264.
- form of action, 265.
- per quod actions, 265.
- contract duty, negligence, 469.
- master's duties to servant, 504
 - duties are peculiar to the relationship, 505.
 - providing appliances, 505.
 - providing safe appliances for work, 507.
 - providing fellow servants, 507.
 - promulgating rules, 508.
 - warning and instructing as to incidental dangers, 509.
 - warning and instructing as to extraneous dangers, 510.
 - inspection, supervision, and enforcement, 510.
 - master not an insurer, 511.
- assumption of risk by servant, 513.
 - ordinary risks, 513.
 - instrumentalities, 513.
 - place, 514.
 - rules, 515.
 - extraordinary risks, 515.
 - assumption of risk, exceptions, 516.
 - appreciation of risk, 517.

[The figures refer to pages.]

MASTER AND SERVANT—Continued,

- assumption of risk as affected by original services, 517.
- promise to remedy defects, 518.
- justification in law, 519.
- assumption not properly voluntary, 519.
- risk of fellow servants, 520.
- reason of the rule, 520.
- who are fellow servants, 521.
- common employment, 522.
- vice principals, 523.
- confusion in opinion, 523.
- negatively as to who is a vice principal, 523.
- vice principals, performance of duty the test, 523.
- vice principals, doctrine of United States supreme court, 527.
- concurrent negligence of master, 528.
- statutory changes, 530.

MENTAL ATTITUDE,

- of tortfeasor, 7, 26.
- absolute liability, 28.
- proper intention cannot make unlawful conduct lawful, 32.
- wrongful intention cannot make lawful conduct unlawful, 32.
- intentional or malicious torts, 34.
- inadvertence essential to negligence, 450.

MENTAL SUFFERING,

- as element of damage, 231.

MERGER,

- trespass merged in felony, 8.

MINISTERIAL ACTS,

- liability of judges for, 77.

MINISTERIAL OFFICERS,

- liability for acts of subordinates, 84, 85.

MISFEASANCE—MALFEASANCE—NONFEASANCE,

- distinction, 26.

MISREPRESENTATIONS,

- see "Deceit."

MITIGATION OF DAMAGES,

- see "Damages."

MOTIVE,

- for nuisance immaterial, 431.

[The figures refer to pages.]

MUNICIPAL CORPORATIONS,

- liability for authorized acts, 87.
- liability for torts, 105.
- authorized acts of agents or officers, 107.
- acts in performance of governmental functions, 105.
- conduct ultra vires, 107.
- unauthorized acts of agents and officers, 107.
- damages incident to authorized act, 108.
- involuntary quasi corporations, 108.

N

NATURAL AND PROBABLE CONSEQUENCES,

- see "Cause."

NECESSITY,

- rights of, 91.

NEGLIGENCE,

- as between master and servant, see "Master and Servant."
- negligent conduct, when actionable, 62.
- negligent injury to wrongdoer, 115.
- right to contract against liability for, 172.
- contributory, as defense in an action for deceit, 315.
- deceit, false statements without knowledge, but with negligence, 331.
- distinguished from nuisance, 420.
- definition, essential elements, 449.
- mental element, inadvertence essential to negligence, 450.
- willful and wanton negligence, 451.
- degrees of negligence, 452.
- duty to exercise care, 454.
 - common-law duty, 454.
 - course and constitution of nature, 454.
 - dangerous instrumentalities, duty to insure safety, 456.
 - illustrations of rule as to dangerous instrumentality, 456.
 - knowledge, 462.
 - capacity and class of parties to wrong, 463.
 - persons deprived of reason, 463.
 - persons of defective capacity or sense, 463.
 - ordinary persons, 463.
 - custom and license, 464.
 - duty to persons in public places, 465.
 - law of the road, 465.
 - care to be exercised at level railroad crossings, 466.
 - interference with highways, 466.

[The figures refer to pages.]

NEGLIGENCE—Continued,

- duty to trespassers, licensees, and invited persons, 467.
- contract duty, 468.
 - master and servant, 469.
 - telegraph companies, 469.
 - negligence, 469.
 - carriers, 470.
 - action by stranger, 471.
 - damage caused by dangerous things, 472.
 - negligent performance of contract 473.
 - effect of limitation as to third persons. 474.
 - includes want of competent skill, 474.
- statutory duty, 475.
 - purely public duties, 475.
 - private duties, 476.
 - negligent violation of statutory duty. 477.
 - question for jury, 477.
 - connection as cause of harm, 479.
 - violation of duty, 480.
 - province of court and jury, 480.
 - questions for court, 480.
 - questions for jury, 481.
 - burden of proof, 482.
 - exceptions, contract or undertaking, 483.
 - res ipsa loquitur, 483.
 - statutory changes, 484.
 - burden of showing contributory negligence, 485.
- evidence, 486.
- custom and usage, 487.
- damages, 487.
- contributory negligence, 488.
 - analogy to defendant's negligence, 488.
 - elements of contributory negligence, 489.
 - duty to exercise care, 490.
 - exposure to danger, 490.
 - avoiding threatened danger before damage done, 491.
 - avoiding unnecessary damage after injury, 492.
 - no duty to anticipate negligence, 492.
 - connection as cause of harm, 493.
- comparative negligence, 496.
- vicarious negligence, 497.
 - of parent, injury to child, 503.
- master and servant, inspection, supervision, and enforcement of rules, 510.

[The figures refer to pages.]

NOMINAL DAMAGES,

see "Damages."

NONFEASANCE,

see "Misfeasance."

NOTARY PUBLIC,

liability of, 82.

NUISANCE,

letting premises in state of nuisance, 131.

continuing nuisance, 223, 225.

defined, 419.

distinguished from trespass, 419.

distinguished from negligence, 420.

rights invaded, 421.

injury to corporeal property, 421.

incorporeal property, injury to easement of light and air, 422.

lateral and subjacent support, 422.

interference with water rights, 423.

interference with percolating, subterranean, and artificial waters, 423.

interference with surface water, 426.

nuisance on highways, 427.

interference with health, comfort, and convenience, 428.

the annoyance or interference, 429.

use of property, 429.

personal conduct, 430.

care and motive immaterial, 431.

coming to nuisance, 432.

locality of nuisance, 433.

damages as the gist, 434.

when substantially a trespass, 434.

substantial interference with comfort, 435.

kinds of nuisances, 436.

public, private, or mixed nuisances, 436.

kinds of nuisance for which private action may lie, 436.

private action for public nuisance, 437.

private nuisances, 438.

continuing nuisances, 438.

legalized nuisance, 439.

authorized by statute, 439.

authorized by common law, 441.

parties to proceedings against, 442.

parties plaintiff, 442.

parties defendant, 443.

[The figures refer to pages.]

NUISANCE—Continued,

- remedies, 444.
 - abatement by act of party, 445.
 - abatement by action, 446.
 - equitable remedies, 446.
 - damages, 448.

O

OBLIGATIONS,

- four kinds, 11.
 - contract, 15.
 - quasi contract, 15.
 - torts, 16.
 - quasi contract, 15.
- common-law remedies, 18.

OFFICERS,

- liability of executive public officers, 78.
- of court, exemption from liability, 79.
- liability of municipal corporations for acts of, 107.
- arrests with and without warrants, 248.

OMISSION,

- may be a tort, 26.

P

PAIN,

- as element of damage, 231.

PARENT AND CHILD,

- damages for loss of service of child, 266.
- actions for injuries to child, 267.
- seduction of child, 271.
- child could not recover against her seducer, 268.
- loss of services the gist of action for injuries to child, 266.
- abolition by statute or decision of fiction of service, 269.
- exemplary damages for injuries to child, 269.
- consent as defense in actions for injuries to child, 269.
- miscellaneous injuries to child, 372.
- action by child against parent, 274.
- negligence of parent, injury to child, 502.

PARTIES,

- to judicial proceedings exempt from liability, 79.
- to agreement discharging liability for torts, 177.
- in actions for injuries to wife, 279.
- in action for malicious prosecution, 354.

[The figures refer to pages.]

PARTIES—Continued,

- involved in conversion, 413.
- to proceedings against nuisance, 442.
- negligence, capacity, and class of parties to wrong, 463.

PARTNERS,

- liability for torts of co-partner, 167.

PECUNIARY LOSS,

- as element of damage, 230.

POISONS,

- sale of, liability for negligence, 473.

POSSESSION,

- duty to respect property and, 378.
- remedies for disturbance of, 378.
- nature of, 381.
- sufficiency to maintain trespass, 384.
- constructive possession, kinds, 387.

POSTMASTERS,

- liability for wrongs of subordinates, 84.

PRINCIPAL AND AGENT,

- see "Master and Servant."

PRIVILEGE,

- variations in right to sue based on, 68.
- as a defense in action for defamation, 308.

PROBABLE CAUSE,

- in action for malicious prosecution, 354.

PROCESS,

- malicious abuse of, 361.
- legal process as a defense to trespass, 388.

PROMISE,

- does not constitute deceit, 338.

PROVOCATION,

- as a defense to assault and battery, 261.
- mitigation of damages for defamation, 320.

PROXIMATE AND REMOTE CAUSE,

- see "Cause"; "Damages."

PUBLICATION,

- of defamation, see "defamation."

PUBLIC WRONGS,

- special injury, 80.

[The figures refer to pages.]

Q**QUASI CONTRACT,**

what is, 15.

sued ex contractu or ex delicto, 19.

QUASI MUNICIPAL CORPORATIONS,

liability for torts, 105, 108.

QUASI TORTS,

obligation of, 17.

action ex contractu or ex delicto, 21.

R**RAILROAD CROSSINGS,**

care to be exercised at, 466.

RATIFICATION,

liability for torts by, 40.

what constitutes, 40.

equivalent to antecedent authority, 41.

is total, not partial, 42.

effect on liability of tortfeasor, 42.

liability for false imprisonment by, 246.

REAL ACTIONS,

for specific recovery of real property only, 12.

REGISTER OF DEEDS,

liability of, 82.

RELATIONSHIP,

liability by reason of, 36, 125.

liability for false imprisonment by, 246.

RELEASE,

of one joint tortfeasor, effect, 195.

REMEDIES,

for torts as distinguished from crimes, 8.

trespass merged in felony, 8.

common-law remedies, 18.

contracts sued ex delicto, 19.

quasi contracts sued ex contractu or ex delicto, 19.

torts sued ex contractu, 20.

quasi torts, 21.

effect of abolishing forms of action, 21.

[The figures refer to pages.]

REMEDIES—Continued,

normal right, 22.

consent as a bar, 23.

wrongdoing as a bar, 23.

for torts, 197.

extrajudicial remedies, 197.

self-help, 197.

judicial remedies, 198.

damages, 199.

nominal damages, 199.

de minimis non curat lex, 204.

nominal damages establish rights, 204.

compensatory damages, 205.

proximate and remote consequences, 207.

direct and consequential losses, 208.

entirety of demand, 222.

past and future losses, 223.

elements of damage, 229.

exemplary damages, 234.

aggravation and mitigation of damages, 237.

excessive and adequate damages, 238.

statutory changes as to damages, 241.

for violation of property rights founded on possession, 378.

for trespass, 396.

for waste, 402.

for conversion, 416.

for nuisance, 444.

REMOTE CAUSE,

see "Damages."

RES IPSO LOQUITUR,

negligence, 483.

REVOCATION,

of license, 393.

RIGHTS AND WRONGS,

tort a violation of legal as distinguished from moral rights, 50.

legal rights, 50.

damage an essential element of legal wrong, 52.

damnum and injuria, 54.

authorized conduct not actionable, 54.

forbidden conduct, 57.

absolute rights, 57, 58, note 222.

public wrongs, 59.

[The figures refer to pages.]

RIGHTS AND WRONGS—Continued,

- conduct neither authorized nor forbidden, 60.
 - malicious conduct, 61.
 - negligent conduct, 62.
 - conduct at peril, 62.
- recapitulation, 63.
- wrongfulness as to time and place, 64.
- cause of action as to time, 65.
- liability of executive officers for violation of public duties, 78.
 - of private duties, 80.
 - special injury, 80.

RULES,

- see "Master and Servant."

S

SAFETY,

- duty to insure, 62.
- conduct at peril, 62.

SCOPE OF AUTHORITY,

- see "Master and Servant."
- liability of corporation for agent's or servant's act, 104.
- corporators may make corporation liable, 104.

SEDUCTION,

- defined, 270.
- recovery by person seduced, 270.
- recovery by parent, 271.
- damages, 271.
- of servant, damages for, 264.
- action by parent, 267, 268.
- child could not recover, 268.
- exemplary damages recoverable by parent, 269.

SELF-DEFENSE,

- right of private defense, 91.

SELF-HELP,

- as remedy for torts, 197.
- private defense in assault and battery, 257.
- as remedy for trespass, 396.

SERVANTS,

- see "Master and Servant."
- of legislature, liability, 72.

SHERIFFS,

- liability of, 81.

[The figures refer to pages.]

SLANDER,

see "Defamation."

SLANDER OF TITLE OR PROPERTY,

see "Defamation."

SLEEPING-CAR COMPANY,

porter as servant of railroad company, 140.

SPECIAL INJURY,

in action against public executive officers, 80.

STATUTE OF LIMITATION,

discharge of liability for tort by running of statute, 189.

STATUTES,

negligence in performance of statutory duty, 475.

STRIKES AND BOYCOTTS,

as actionable conspiracy, 366.

SUBSTANTIVE LAW,

of torts, 2, 22.

the person injured, 22.

the tort feisor, 24.

the wrongful conduct, 26.

why liability attaches, 28.

how liability attaches, 35.

SUNDAY,

injury while traveling on Sunday, right to recovery, 118.

SURFACE WATER,

see "Water."

T

TENANTS IN COMMON.

trespass between, 385.

TELEGRAPH COMPANIES,

right to contract against negligence, 172.

contract duty, negligence, 469.

THREATS,

do not constitute assault, 253.

TORTS,

definition, 2.

derivation of term, 2.

other definitions, 4.

adjective law of, 5.

[The figures refer to pages.]

TORTS—Continued,

- distinguished from crimes, 5.
- mental attitude of wrongdoer, 7.
- consequences of wrong, 7.
- remedy, 8.
- in what courts cognizant, 9.
- maritime torts, 10.
- administration of the law of, in courts of common law, 11.
- obligation of, 16.
- quasi torts, 17.
- sued *ex contractu*, 20.
- substantive law, 22.
- the tortfeasor, 24.
- may be by act or omission, 26.
- the wrongful conduct, 26.
- why liability attaches, 28.
- unintentional torts, 32.
- intentional or malicious torts, 34.
- how liability attaches, 35.
 - personal commission, 35.
 - consent or command, 35.
 - by relationship, 36.
 - by instrumentalities, 36.
 - by liability operating as an estoppel, 37.
 - liability by ratification, 40.
- election of remedies against infant, 98.
- discharge or limitation of liability by agreement, 171.
- remedies, 197.
- extrajudicial remedies, 197.
- damages, 197.

TRANSITORY ACTION,

- lex loci, lex fori*, 64.

TRESPASS,

- merged in felony, 8.
- action *ex delicto*, 12.
- vi et armis*, 13.
- quare clausum fregit*, 13.
- de bonis asportatis*, 13.
- trespass on the case, 13.
- trespass on the case distinguished, 14.
- continuing trespass, 223, 225.
- definition, 382.

[The figures refer to pages.]

TRESPASS—Continued,

- possession to maintain, 384.
- as between persons in special relations, 385.
- possession may be with or without title, 385.
- possession must be exclusive, 386.
- possession must be had animo possidendi, 387.
- possession at time of wrong, not of action, 387.
- constructive possession, 387.
- defenses 388.
 - authority of law, legal process, 388.
 - authority without legal process, 389.
 - abuse of license, trespass ab initio, 391.
 - consent of owner or occupant, 392.
 - liberum tenementum, 394.
 - easement or special property, 395.
 - forcible entry, 395.
- remedies, 396.
 - self-help, 396.
 - injunction, 396.
 - damages, 396.
- distinguished from nuisance, 419.

TRESPASSERS,

- duty to trespassers, negligence, 467.
- right of trespasser to recover for injuries, 114.

TROVER AND CONVERSION,

- conversion defined, 403.
- title to maintain, 404.
- the unauthorized act, 406.
- violation of absolute duty, 408.
- subsequent dealings with property, 408.
- wrongfully taking property, 409.
- wrongfully parting with property, 410.
- wrongfully retaining property, 411.
- demand and refusal, when necessary to show, 411.
- wrongful destruction of property, 413.
- parties, 413.
- real owner, 414.
- in performance of ministerial duties, 415.
- remedies, 416.
 - damages, 416.
 - special damages, 418.
 - exemplary damages, 418.

[The figures refer to pages.]

U

UBI JUS IBI REMEDIUM,
application of maxim, 50.

UNITED STATES,
exemption from liability, 70.

V

VARIATION IN RIGHT TO SUE,
authorized conduct not actionable, 54.
variations based on privilege of actor, 68.
public acts, acts of state, 69.
exemption in general, 69.
consent to liability, 70.
exemption of the United States, 70.
exemption of the various states, 71.
exemption of foreign powers, 71.
conduct of legislators, 72.
conduct of judicial officers, 73.
conduct within jurisdiction, 73.
judicial officers de jure or de facto, 74.
reason, 75.
courts of record and inferior courts, 76.
liability in absence of jurisdiction, 77.
exemption as to ministerial acts, 77.
conduct of executive officer, 78.
violation of purely public duties, 78.
the exemption applies generally to persons engaged in judicial proceedings, 79.
violation of private duties, 80.
special injury, 80.
liability of sheriffs, constables, etc., 81.
liability of other officers, 82.
unauthorized acts, 83.
liability of public officers for wrongs of subordinates, 84.
private acts, 86.
exercise of statutory rights, authorized conduct, 86.
abuse or excess of authority, 88.
exercise of common-law rights, 89.
common rights, 89.
use of property, 89.
disciplinary powers, 90.

[The figures refer to pages.]

VARIATION IN RIGHT TO SUE—Continued,

- rights of necessity, 91.
- right of private defense, 91.
- variations based on status, 93.
 - insane persons, 93.
 - absolute liability, 93.
 - qualified liability, 94.
 - infancy, 96.
 - infancy ordinarily no defense, 96.
 - tenderness of age of defendant, 97.
 - election of remedies, tort or contract, 98.
 - bailment, 98.
 - fraud, 99.
 - election to sue in assumpsit, 99.
 - drunkards, 100.
 - convicts, 101.
 - alien enemies, 101.
 - private corporations, 101.
 - ultra vires, 103.
 - scope of agent's or servant's authority, 104.
 - municipal and quasi municipal corporations, 105.
 - acts in performance of governmental functions, 105.
 - conduct ultra vires, 107.
 - authorized acts of agents and officers, 107.
 - damage incident to authorized act, 108.
 - involuntary quasi corporations, 108.
 - corporations not municipal engaged in public work, 109.
 - public works engaged in for profits, 109.
 - public charity, 110.
- variations based on conduct of plaintiff, 111.
 - wrongdoing by plaintiff, 111.
 - wanton injury, 114.
 - negligent injury, 115.
 - consent by plaintiff, 116.
 - knowledge and option, 117.
 - consent limited by parties, 118.
 - consent limited by law, 118.

VICARIOUS NEGLIGENCE,

see "Negligence."

VICE PRINCIPALS,

see "Master and Servant."

VOLENTI NON FIT INJURIA,

application of maxim, 116.

[The figures refer to pages.]

W

WAIVER.

- of liability for tort, 170.
- of tort as to one joint tortfeasor, effect, 195.

WASTE,

- definition, 397.
- kinds of waste, 398.
- permissive or commissive waste, 398.
- permissive waste, who liable, 398.
- commissive waste, who liable, 399.
- legal and equitable waste, 401.
- remedies, 402.
 - damages, 402.
 - injunction, 402.

WATER,

- interference with water rights, nuisance, 423.
- interference with percolating, subterranean, and artificial waters, 426.
- interference with surface water, 426.
- accumulations of water, liability for, 457.

WIFE,

- see "Husband and Wife."

WITNESS,

- exemption from liability, 79.

WRITS,

- original writ, 12.

The Hornbook Series.

C649c

24

This series is to comprise elementary treatises on all the principal subjects of the law. The books are made on the same general plan, in which certain special and original features are made prominent. These are:

1. **A brief analytical presentation of the principles and rules of the subject.** This part is distinguished typographically by being printed in large black type, and these black-letter paragraphs, running through the book, constitute a complete, though concise, synopsis of the law of the subject. Like the syllabus of a case, this affords a bird's-eye view of the whole and its parts, and will be found useful by the lawyer who wishes to refresh his memory of the outlines of this branch of the law.

2. **A Commentary**, being a more extended presentation of the topics in the leading analysis, distinguished by being set in different type. The typographical separation of these two parts enables the examiner to obtain, in the first place, a general, comprehensive grasp of the subject as a whole, and of the relation of one part to another, and, by re-reading in connection with the more extended commentary, to fix the details clearly in mind.

3. **Notes**, in still different type, containing a copious citation of authorities, including the leading and most important cases. These are so distinguished as to still further illustrate the principles.

PRICE, \$3.75 PER VOLUME, INCLUDING DELIVERY.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of The Law of Contracts,

By Wm. E. Clark, Jr.,

Author of a "Handbook of Criminal Law."

CHAPTER I.

CONTRACT IN GENERAL: Covering its definition, nature, and requisites, and discussing agreement, obligation, promise, void, voidable, and unenforceable agreements, and the essentials of contract, etc.

CHAPTER II.

OFFER AND ACCEPTANCE: Covering implied contracts, necessity for communication and acceptance, character, mode, place, time, and effect of acceptance, revocation, and lapse of offer, etc.

CHAPTER III.

CLASSIFICATION OF CONTRACTS: Covering contracts of record and contracts under seal, and their characteristics.

CHAPTER IV.

REQUIREMENT OF WRITING: Covering also statute of frauds, and discussing promise by executor, promise to answer for another, agreements in consideration of marriage and in relation to land, and agreements not to be performed within a year, sufficiency of memorandum, etc.

CHAPTER V.

CONSIDERATION: Covering the necessity for consideration, its adequacy, reality, and legality, failure of consideration, etc.

CHAPTER VI.

CAPACITY OF PARTIES: Covering political and professional status, infants, insane and drunken persons, married women, and corporations.

CHAPTER VII.

REALITY OF CONSENT: Covering mistake, misrepresentation, fraud, duress, and undue influence.

CHAPTER VIII.

LEGALITY OF OBJECT: Covering unlawful agreements in general, agreements in violation of positive law and those contrary to public policy, effect of illegality, conflict of laws, etc.

CHAPTER IX.

OPERATION OF CONTRACT: Covering the limits of the contractual relation, assignment of contracts, whether by act of parties or by operation of law, joint and several contracts, etc.

CHAPTER X.

INTERPRETATION OF CONTRACT: Covering the rules relating to evidence, proof of document, rules of construction, penalties and liquidated damages, etc.

CHAPTER XI.

DISCHARGE OF CONTRACT: Covering discharge by agreement, by performance, by breach, by impossibility of performance, by operation of law, etc., and remedies on breach of contract.

CHAPTER XII.

AGENCY: Covering the creation of the relation, its effect and determination, the capacity, rights, and liabilities of the parties, etc.

CHAPTER XIII.

QUASI CONTRACT: Covering obligations created by law upon which an action *ex contractu* will lie without proof of contract in fact, including judgments, obligations imposed by statute, acts of parties, etc.

1 VOL., 932 PAGES, \$3.75 DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of Common-Law Pleading.

By Benjamin J. Shipman.

SECOND EDITION.

TABLE OF CONTENTS.

Chapter I.

FORMS OF ACTION: Covering the nature and classification of actions, real, personal, and mixed actions, assumpsit, special and general, debt, covenant, account or account rendered.

Chapter II.

FORMS OF ACTION (Continued): Covering trespass, trover, case, detinue, replevin, ejectment, writ of entry, forcible entry and detainer, etc.

Chapter III.

THE PARTIES TO ACTIONS: Covering actions in form *ex contractu* and *ex delicto*, and the consequences of misjoinder or nonjoinder of parties plaintiff or defendant.

Chapter IV.

THE PROCEEDINGS IN AN ACTION: Covering process, the summons, writ of attachment, appearance, the declaration, demurrer, and various pleas, amendments, etc., the verdict, and proceedings after the verdict, the judgment, and proceedings thereafter to the writ of execution.

Chapter V.

THE DECLARATION: Statement of cause of action in general; form of declaration; essential averments of declaration in special assumpsit or on common counts, in debt, covenant, account, case, detinue, trover, trespass, replevin, ejectment, and trespass for mesne profits after ejectment.

Chapter VI.

THE PRODUCTION OF THE ISSUE: Discussing the rules, and covering the demurrer, the pleadings, the traverse, forms of the general issue and of the special traverse, protestations, exceptions, issues in fact and law, etc.

Chapter VII.

MATERIALITY IN PLEADING: Covering the general rule, variance, limitation of traverse, etc.

Chapter VIII.

SINGLENESS OR UNITY IN PLEADING: Covering the rules in general, duplicity, immaterial matter, inducement, protestation, consequences of duplicity and of misjoinder, plea and demurrer, etc.

Chapter IX.

CERTAINTY IN PLEADING: Covering the venue, time, quantity, quality, and value, names of persons, showing title and authority, with subordinate rules, and special requirements in different stages.

Chapter X.

CONSISTENCY AND SIMPLICITY IN PLEADING: Covering insensibility, repugnancy, ambiguity, argumentative pleadings, pleadings in alternative, positive statements, legal effect, conformance to precedent, commencement and conclusion.

Chapter XI.

DIRECTNESS AND BREVITY IN PLEADING: Covering the rules generally, departure, pleas amounting to general issue, surplusage, etc.

Chapter XII.

MISCELLANEOUS RULES: Covering conformance to process, alleging damages and production of suit, order of pleading, defense, plea in abatement, dilatory pleas, etc.

APPENDIX: Forms.

This book embodies such of the rules and principles of Common-Law Pleading as are still recognized and applied in this country. A knowledge of the common-law system is of advantage, if indeed, it is not essential, to a thorough understanding of both code and equity pleading.

ONE VOLUME, 615 PAGES, \$3.75, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of Constitutional Law

By **H. Campbell Black**, Author of Black's Law Dictionary, Treatises on Judgments, Tax Titles, etc.

Second Edition.

TABLE OF CONTENTS.

Chapter I.

DEFINITIONS AND GENERAL PRINCIPLES: Considering the meaning of "Constitutional" and "Unconstitutional;" written and unwritten constitutions, bills of rights, right of revolution, political and personal responsibilities, etc.

Chapter II.

THE UNITED STATES AND THE STATES: Considering the nature of the American Union, sovereignty and rights of the states and of the people, form of government, the Federal Constitution, etc.

Chapter III.

ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS: Containing an historical introduction, and considering the establishment and amendment of the Federal Constitution and of State Constitutions.

Chapter IV.

CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS: Considering the office and duty of the judiciary in this direction.

Chapter V.

THE THREE DEPARTMENTS OF GOVERNMENT: Considering the division, limitations on the departments, political and judicial questions, etc.

Chapter VI.

THE FEDERAL EXECUTIVE: Considering the election, qualifications, impeachment, compensation and independence of the President, his oath of office, veto power, pardoning and military power, and treaty-making power; vacancy in office, the cabinet, appointments to office, presidential messages, diplomatic relations, authority to convene and adjourn congress, execute the laws, etc.

Chapter VII.

FEDERAL JURISDICTION: Considering the jurisdiction, powers and procedure of Federal courts, removal of causes, the United States and the states as parties, etc.

Chapter VIII.

THE POWERS OF CONGRESS: Considering the constitution, organization and government of congress, its powers, and the limitations thereon.

Chapter IX.

INTERSTATE LAW, as determined by the Constitution: Considering its general principles, the privileges of citizens, interstate extradition, public acts and judicial proceedings, etc.

Chapter X.

REPUBLICAN GOVERNMENT GUARANTIED.

Chapter XI.

EXECUTIVE POWER IN THE STATES.

Chapter XII.

JUDICIAL POWERS IN THE STATES: Considering the system of courts, judges, jurisdiction, process and procedure.

Chapter XIII.

LEGISLATIVE POWER IN THE STATES: Considering the organization and government of legislature, limitation and delegation of legislative powers, enactment of laws, etc.

Chapter XIV.

THE POLICE POWER: Considering the police power as vested in congress and in the states and its scope and limitations.

Chapter XV.

THE POWER OF TAXATION: Considering the purposes of taxation, independence of Federal and State governments, limitations on power, taxation and representation, etc.

Chapter XVI.

THE RIGHT OF EMINENT DOMAIN: Definition and nature of the power, constitutional provisions, authority to exercise, public purpose, appropriation to new uses, etc.

Chapter XVII.

MUNICIPAL CORPORATIONS: The nature, control, powers, officers and by-laws of municipal corporations, etc.

Chapter XVIII.

CIVIL RIGHTS, AND THEIR PROTECTION BY THE CONSTITUTION: Considering rights in general, liberty, due process of law, vested rights, trial by jury, etc.

Chapter XIX.

POLITICAL AND PUBLIC RIGHTS: Considering citizenship, right of suffrage, freedom of speech, right of assembly and petition, etc.

Chapter XX.

CONSTITUTIONAL GUARANTIES IN CRIMINAL CASES: Considering trial by jury, rights of accused, jeopardy, bail, ex post facto laws, habeas corpus, etc.

Chapter XXI.

LAWS IMPAIRING THE OBLIGATION OF CONTRACTS: Considering the obligation and the impairment of the contract, power of legislature to contract, remedies on contracts, etc.

Chapter XXII.

RETROACTIVE LAWS: Considering the validity of retroactive statutes, curative statutes, etc.

1 VOL., 740 PAGES, \$3.75, DELIVERED.

WEST PUBLISHING COMPANY, St. Paul, Minn.

(The Hornbook Series.)

A Handbook of Equity Jurisprudence.

By Norman Fetter.

TABLE OF CONTENTS.

Chapter I. NATURE AND DEFINITION OF EQUITY.	Chapter VIII. PROPERTY IN EQUITY—TRUSTS: Covering definition, history, and classification of trusts, charitable trusts, duties and liabilities of trustees, remedies of <i>cestui que trust</i> , etc.
Chapter II. PRINCIPLES DEFINING AND LIMITING JURISDICTION: Considering jurisdiction over crimes, adequate legal remedy, complete relief, and multiplicity of suits.	Chapter IX. PROPERTY IN EQUITY — MORTGAGES, LIENS, AND ASSIGNMENTS.
Chapter III. THE MAXIMS OF EQUITY: Definition and classification of maxims; the enabling and restrictive maxima.	Chapter X. EQUITABLE REMEDIES: Covering accounting, contribution, exoneration, subrogation, and marshaling.
Chapter IV. THE DOCTRINES OF EQUITY: Considering estoppel, election, satisfaction, performance, and conversion.	Chapter XI. EQUITABLE REMEDIES (CONTINUED): Covering partition and settlement of boundaries.
Chapter V. THE DOCTRINES OF EQUITY (CONTINUED): Considering conflicting rights of purchasers, assignees, notice, bona fide purchasers, priorities, etc.	Chapter XII. EQUITABLE REMEDIES (CONTINUED): Covering specific performance, and considering enforceable contracts, grounds for refusing relief, etc.
Chapter VI. THE DOCTRINES OF EQUITY (CONTINUED): Considering penalties and forfeitures, liquidated damages.	Chapter XIII. EQUITABLE REMEDIES (CONTINUED): Covering injunctions, and considering their jurisdictional principles, classes of cases where remedy may be used, etc.
Chapter VII. GROUND FOR EQUITABLE RELIEF: Considering accident, mistake, fraud, etc.	Chapter XIV. REFORMATION, CANCELLATION, AND QUIETING TITLE.
	Chapter XV. ANCILLARY REMEDIES: Covering discovery, bills to perpetuate testimony, interpleader, receivers, etc.

1 VOL., 474 PAGES, \$3.75, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of Criminal Procedure.

By Wm. E. Clark, Jr.,

Author of a "Handbook of Criminal Law," and a
"Handbook of Contracts."

TABLE OF CONTENTS.

Chapter I. JURISDICTION: Covering courts of criminal jurisdiction and venue.	Chapter VIII. PLEADING—THE ACCUSATION (Continued): Covering indictments on statutes.
Chapter II. APPREHENSION OF PERSONS AND PROPERTY: Covering arrest in general, warrants, extradition, searches and seizures of property, and taking property from prisoner.	Chapter IX. PLEADING—THE ACCUSATION (Continued): Covering duplicity, joinder of counts and parties, election, conclusion of indictment, amendment, aid by verdict, etc.
Chapter III. PRELIMINARY EXAMINATION, BAIL, AND COMMITMENT: Covering right to release on bail, habeas corpus, the recognizance, release of sureties, etc.	Chapter X. PLEADING AND PROOF: Covering variance and conviction of minor and higher offense.
Chapter IV. MODE OF ACCUSATION: Covering the indictment and presentment, information, coroner's inquisition, time of prosecution, and nolle prosequi, etc.	Chapter XI. MOTION TO QUASH: Covering also arraignment, demurrer, and pleas of defendant.
Chapter V. PLEADING—THE ACCUSATION: Covering form of indictment in general, the commencement, and the statement of offense and description of defendant.	Chapter XII. TRIAL AND VERDICT: Covering time and place of trial, custody and presence of defendant, bill of particulars, the counsel, judge and jury, arguments and instructions, etc.
Chapter VI. PLEADING—THE ACCUSATION (Continued): Covering allegation of intent, knowledge, etc.; technical terms; second or third offense; setting forth writings; description of property and persons; ownership.	Chapter XIII. PROCEEDINGS AFTER VERDICT: Covering motion in arrest of judgment, sentence, new trial, writ of error, etc.
Chapter VII. PLEADING—THE ACCUSATION (Continued): Covering statement of time and place.	Chapter XIV. EVIDENCE: Covering facts in issue, motive, res gestae, other crimes, declarations, confessions, character, burden of proof, witnesses, etc.
	Chapter XV. HABEAS CORPUS.

1 VOL. 658 PAGES. \$3.75, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.



Handbook of the Law of Sales

By Francis B. Tiffany, A. B., LL. B. (Harvard).
Author of "Tiffany on Death by Wrongful Act."

TABLE OF CONTENTS.

<p>Chapter I.</p> <p>FORMATION OF THE CONTRACT: Covering the capacity of parties, who may sell, the thing sold, mutual assent, form, and price.</p> <p>Chapter II.</p> <p>FORMATION OF THE CONTRACT (Continued): Covering the statute of frauds.</p> <p>Chapter III.</p> <p>EFFECT OF THE CONTRACT IN PASSING THE PROPERTY: Covering sales of specific chattels,—unconditional sales, conditional sales, sale on trial or approval, and sale or return.</p> <p>Chapter IV.</p> <p>EFFECT OF THE CONTRACT IN PASSING THE PROPERTY (Continued): Covering sales of chattels not specific, appropriation of property to the contract, reservation of right of disposal, etc.</p> <p>Chapter V.</p> <p>MISTAKE, FAILURE OF CONSIDERATION, AND FRAUD: Showing the effect of mistake, failure of consideration, and fraud generally, frauds on creditors, the delivery necessary as against creditors and purchasers, etc.</p>	<p>Chapter VI.</p> <p>ILLEGALITY: Covering sales prohibited by the common law, by public policy, and by statute; the effect of illegality, and the conflict of laws.</p> <p>Chapter VII.</p> <p>CONDITIONS AND WARRANTIES: Covering conditions and warranties generally.</p> <p>Chapter VIII.</p> <p>PERFORMANCE: Covering fully delivery, the buyer's right of examination, acceptance, and payment.</p> <p>Chapter IX.</p> <p>RIGHTS OF UNPAID SELLER AGAINST THE GOODS: Covering the seller's lien, stoppage in transitu, and the right of resale.</p> <p>Chapter X.</p> <p>ACTION FOR BREACH OF THE CONTRACT: Covering the various remedies of the seller and of the buyer.</p>
---	---

1 Volume. 356 Pages. \$3.75, Delivered.

(Hornbost Series.)

A Handbook of International Law,

By Capt. Edwin F. Glenn, Acting Judge Advocate,
United States Army.

TABLE OF CONTENTS.

INTRODUCTION.

Covering the definition, source, and nature of International Law.

Chapter I.

PERSONS IN INTERNATIONAL LAW: Covering states, their loss of identity, various unions of states, de facto states, belligerency and recognition thereof, and equality of states.

Chapter II.

THE COMMENCEMENT OF STATES—FUNDAMENTAL RIGHTS AND DUTIES: Covering the commencement and recognition of new states, effect of change of sovereignty, the fundamental rights and duties of states, etc.

Chapter III.

TERRITORIAL PROPERTY OF A STATE: Covering modes of acquiring property, boundaries, territorial waters, etc.

Chapter IV.

TERRITORIAL JURISDICTION: Covering extraterritoriality, sovereigns and diplomatic agents and their immunities, vessels, right of asylum, alienage, responsibility for mob violence, extradition, jurisdiction beyond state limits, etc.

Chapter V.

JURISDICTION ON THE HIGH SEAS AND UNOCCUPIED PLACES: Covering nature of jurisdiction, jurisdiction over merchant ships, piracy, privateers, letters of marque, slave trade, etc.

Chapter VI.

THE AGENTS OF A STATE IN INTERNATIONAL RELATIONS: Covering public diplomatic agents and consuls, and matters relating to them.

Chapter VII.

INTERVENTION: Covering the subject generally.

Chapter VIII.

NATIONALITY: Covering citizenship, allegiance, expatriation, naturalization, etc.

Chapter IX.

TREATIES: Covering the subject generally.

Chapter X.

AMICABLE SETTLEMENT OF DISPUTES: Covering mediation, arbitration, retorsion, reprisals, embargo, pacific blockade, etc.

Chapter XI.

INTERNATIONAL RELATIONS IN WAR: Covering the subject of war generally, including the kinds, causes, and objects of war.

Chapter XII.

EFFECTS OF WAR—AS TO PERSONS: Covering the relations of enemies, noncombatants, privateers, prisoners of war, and the subjects of ransom, parole, etc.

Chapter XIII.

EFFECTS OF WAR—AS TO PROPERTY: Covering contributions, requisitions, foraging, booty, ransom, and other questions in regard to property.

Chapter XIV.

POSTLIMINIUM: The right and its limitations defined and explained.

Chapter XV.

MILITARY OCCUPATION: Covering the definition, extent, and effect of occupation, and the duties of an occupant.

Chapter XVI.

MEANS OF CARRYING ON HOSTILITIES: Covering the instruments and means of war, spies, etc.

Chapter XVII.

ENEMY CHARACTER: Covering enemies generally, domicile, houses of trade, property and transfer thereof, etc.

Chapter XVIII.

NON-HOSTILE RELATIONS: Covering commercia belli, flags of truce, passports, safe-conducts, truces or armistices, cartels, etc.

Chapter XIX.

TERMINATION OF WAR: Covering the methods of termination, uti possidetis, treaties of peace, conquest, etc.

Chapter XX.

OF NEUTRALITY IN GENERAL: Neutrality defined and explained.

Chapter XXI.

THE LAW OF NEUTRALITY BETWEEN BELLIGERENT AND NEUTRAL STATES: Covering the rights, duties, and liabilities of neutral states.

Chapter XXII.

CONTRABAND: Covering the subject generally.

Chapter XXIII.

BLOCKADE: Covering the subject generally.

Chapter XXIV.

VISIT AND SEARCH, AND RIGHT OF AN- GARY: Covering those subjects generally.

APPENDIX.

Giving in full, as in no other single work, the instructions for the Government of Armies of the United States in the Field (Lieber); Papers Carried, or that Ought to be Carried, by Vessels in Evidence of their Nationality; The Declaration of Paris; The Declaration of St. Petersburg; The Geneva Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field; The Laws of War on Land, (Recommended for Adoption by the Institute of International Law at Oxford, Sept. 2, 1880); and The Brussels Conference.

(The Hornbook Series.)

A Handbook of The Law of Torts.

By

Edwin A. Zaggard, A. M., LL. B.,

Professor of the Law of Torts in the Minnesota University Law School.

TABLE OF CONTENTS.

PART I.—IN GENERAL.

Chapter I.

GENERAL NATURE OF TORTS: Covering the law adjective and law substantive, distinctions between torts and crimes, common-law obligations and remedies, how and why liability attaches for torts, the mental element, connection as cause, damnum and injuria, common-law, contract and statutory duties, etc.

Chapter II.

VARIATIONS IN THE NORMAL RIGHT TO SUE: Covering exemptions based on privilege of actor, as public acts of states, of judicial and executive officers, etc., and private acts authorized by statute or common law, variations based on status or conduct of plaintiff, etc.

Chapter III.

LIABILITY FOR TORTS COMMITTED BY OR WITH OTHERS: Covering liability by concert in action or joint torts, and liability by relationship, as husband and wife, landlord and tenant, master and servant, partners, etc.

Chapter IV.

DISCHARGE AND LIMITATION OF LIABILITY FOR TORTS: Covering discharge or limitation by voluntary act of party and by operation of law.

Chapter V.

REMEDIES: Covering statutory and common-law remedies, judicial and extrajudicial remedies, damages, etc.

PART II.—SPECIFIC WRONGS.

Chapter VI.

WRONGS AFFECTING SAFETY AND FREEDOM OF PERSONS: Covering false imprisonment, assault and battery, and the defenses, as justification and mitigation.

Chapter VII.

INJURIES IN FAMILY RELATIONS: Covering the family at common law, master and servant, parent and child, husband and wife.

Chapter VIII.

WRONGS AFFECTING REPUTATION: Covering libel, slander, and slander of title, together with the defenses.

Chapter IX.

MALICIOUS WRONGS: Covering deceit, malicious prosecution, abuse of process, interference with contract, conspiracy, etc.

Chapter X.

WRONGS TO POSSESSION AND PROPERTY: Covering the nature of possession and its objects, trespass, waste, conversion, etc.

Chapter XI.

NUISANCE: Covering kinds of nuisance, as public, private, and mixed, continuing and legalized, parties to proceedings against, remedies, etc.

Chapter XII.

NEGLIGENCE: Covering the duty to exercise care, what is commensurate care, common-law, contract and statutory duties, damages, contributory negligence, etc.

Chapter XIII.

MASTER AND SERVANT: Covering master's liability to servant for negligence, master's duty to servant, assumption of risk by servant, various kinds of risks, fellow servants, vice principals, etc.

Chapter XIV.

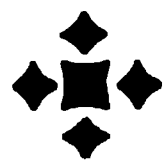
COMMON CARRIERS: Covering the subject generally.

2 VOLS. 1,328 PAGES. \$7.50, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

The Hornbook Series.

A Handbook of



The Construction and Interpretation of Laws,

BY H. CAMPBELL BLACK, AUTHOR OF BLACK'S LAW DICTIONARY, AND TREATISES ON CONSTITUTIONAL LAW, JUDGMENTS, ETC.

TABLE OF CONTENTS.

Chapter I. NATURE AND OFFICE OF INTERPRETATION: Covering definition of terms, object of interpretation, rules of construction, and office of judiciary.	Chapter IX. RETROSPECTIVE INTERPRETATION: Covering definition, constitutional considerations, vested rights, remedial statutes, and statutes regulating procedure.
Chapter II. CONSTRUCTION OF CONSTITUTIONS: Covering method and rules of construction, construction as a whole, common law and previous legislation, retrospective operation, mandatory and directory provisions, preamble and titles, extraneous aids, schedule, stare decisis, etc.	Chapter X. CONSTRUCTION OF PROVISOS, EXCEPTIONS, AND SAVING CLAUSES: Covering the subject generally.
Chapter III. GENERAL PRINCIPLES OF STATUTORY CONSTRUCTION: Covering literal and equitable construction, scope and purpose of the act, casus omissus, implications in statutes, meaningless statutes, errors, misprints, surplusage, interpolation of words, etc.	Chapter XI. STRICT AND LIBERAL CONSTRUCTION: Covering penal and remedial statutes, statutes against common right, against frauds, and of limitation, legislative grants, revenue and tax laws, etc.
Chapter IV. STATUTORY CONSTRUCTION; PRESUMPTIONS: Covering presumptions against exceeding limitations of legislative power, unconstitutionality, injustice, irrepealable laws, implied repeal of laws, etc., presumptions as to public policy, as to jurisdiction of courts, etc.	Chapter XII. MANDATORY AND DIRECTORY PROVISIONS: Definitions and rules covering the subject generally.
Chapter V. STATUTORY CONSTRUCTION; WORDS AND PHRASES. Covering technical and popular meaning of words, commercial and trade, general and special, relative and qualifying, and permissive and mandatory terms; conjunctive and disjunctive particles, adopted and re-enacted statutes, computation of time, etc.	Chapter XIII. AMENDATORY AND AMENDED ACTS Covering construction of amendments and of statute as amended, identification of act to be amended, amendment by way of revision, etc.
Chapter VI. INTRINSIC AIDS IN STATUTORY CONSTRUCTION: Covering construction as a whole, context, title, preamble, interpretation clause, etc.	Chapter XIV. CONSTRUCTION OF CODES AND REVISED STATUTES: Covering construction as a whole, reference to original statutes, change of language, previous judicial construction, etc.
Chapter VII. EXTRINSIC AIDS IN STATUTORY CONSTRUCTION: Covering admissibility of extrinsic aids, statutes in pari materia, contemporary history, construction and usage, journals of legislature, opinions of legislators, etc.	Chapter XV. DECLARATORY STATUTES: Covering definition and construction in general.
Chapter VIII. INTERPRETATION WITH REFERENCE TO COMMON LAW: Covering statutes affirming, supplementing, superseding or in derogation of, common law.	Chapter XVI. THE RULE OF STARE DECISIS AS APPLIED TO STATUTORY CONSTRUCTION: Covering the general principle, reversal of construction, federal courts following state decisions, construction of statutes of other states, etc.
	Chapter XVII. INTERPRETATION OF JUDICIAL DECISIONS AND THE DOCTRINE OF PRECEDENTS: Covering the nature of precedents; dicta; stare decisis; the force of precedents as between different courts; the law of the case, etc.

1 VOLUME. 509 PAGES. \$3.75, DELIVERED.

WEST PUBLISHING CO., - - - ST. PAUL, MINN.

(The Hornbook Series.)

A Handbook of Bailments and Carriers.

By Wm. B. Hale.

TABLE OF CONTENTS.

Chapter I.

IN GENERAL: Covering definition and general principles common to all bailments; classification of bailments.

Chapter II.

BAILEMENTS FOR SOLE BENEFIT OF BAILOR: Covering depositum and mandatum, creation, rights and liabilities of parties, termination, etc.

Chapter III.

BAILEMENTS FOR BAILEE'S SOLE BENEFIT: Commodatum, creation, rights and liabilities of parties, termination, etc.

Chapter IV.

BAILEMENTS FOR MUTUAL BENEFIT—PLEDGES: Covering definition of pledge, creation, title of pledgor, rights and liabilities of parties before and after default, termination, etc.

Chapter V.

BAILEMENTS FOR MUTUAL BENEFIT—HIRING: Locatio or hiring defined; establishment of relation; rights and liabilities of parties; hiring of things for use; hire of labor and services; warehousemen; wharfingers; safe-deposit companies; factors, etc.; termination of relation, etc.

Chapter VI.

INNKEEPERS: Innkeeper defined; who are guests; commencement of relation; duty to receive guest; liability for guests' goods; lien; termination of relation; liability as ordinary bailee, etc.

Chapter VII.

CARRIERS OF GOODS: Common carriers, essential characteristics; when liability attaches; discrimination; compensation; lien; liability as insurers and as ordinary bailees; carriers of live stock; carriers of baggage; contracts and notices limiting liability; termination of liability; connecting carriers, etc.; post-office department; private carriers.

Chapter VIII.

CARRIERS OF PASSENGERS: Who are passengers; when liability attaches; duty to accept passengers; furnishing equal accommodations; ticket as evidence of passenger's rights; right to make regulations; injuries to passengers; contracts limiting liability; termination of liability; ejection from vehicle; connecting carriers, and covering the subject generally.

Chapter IX.

ACTIONS AGAINST CARRIERS: Actions against carriers of goods and carriers of passengers; parties; form of action; pleading; evidence; damages.

1 VOLUME. 675 PAGES. \$3.75, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

The Hornbook Series.)

..@..

Handbook of Elementary Law,

By Walter Denton Smith,

Instructor in the Law Department of the University of Michigan.

TABLE OF CONTENTS.

Part I—ELEMENTARY JURISPRUDENCE.

CHAPTER I.

NATURE OF LAW AND THE VARIOUS SYSTEMS: Moral, divine, municipal, international, maritime and martial law.

CHAPTER II.

GOVERNMENT AND ITS FUNCTIONS: Covering sovereignty, the state, the constitution, and the forms and functions of government generally.

CHAPTER III.

GOVERNMENT IN THE UNITED STATES: Its general character, sovereignty, distribution of powers, citizenship, etc.

CHAPTER IV.

THE UNWRITTEN LAW: The Roman, the Canon and the Common law.

CHAPTER V.

EQUITY: Nature and jurisdiction of equity; maxims.

CHAPTER VI.

THE WRITTEN LAW: Relation to unwritten law; statutory law in general.

CHAPTER VII.

THE AUTHORITIES AND THEIR INTERPRETATION: The rank of authorities, rules of interpretation, statutory construction, etc.

CHAPTER VIII.

PERSONS AND PERSONAL RIGHTS: Legal rights, wrongs and remedies, rights in rem and in personam, status, personal security, liberty, property, constitutional guaranties, etc.

CHAPTER IX.

PROPERTY: Covering, ownership and possession; the Feudal system; corporeal and incorporeal, real and personal, property; fixtures, etc.

CHAPTER X.

CLASSIFICATION OF THE LAW: Substantive and adjective, public and private law, etc.

Part II—THE SUBSTANTIVE LAW.

CHAPTER XI.

CONSTITUTIONAL AND ADMINISTRATIVE LAW: Written and unwritten constitutions, essentials and construction of constitutions; administrative law, etc.

CHAPTER XII.

CRIMINAL LAW: Covering its general nature, criminal capacity, classification of crimes, punishment, etc.

CHAPTER XIII.

THE LAW OF DOMESTIC RELATIONS: Covering marriage and its incidents, parent and child, guardian and ward, master and servant, etc.

CHAPTER XIV.

CORPOREAL AND INCORPOREAL HEREDITAMENTS: Covering the subject generally.

CHAPTER XV.

ESTATES IN REAL PROPERTY: Classification, estates in possession and in expectancy; freeholds and estates less than freehold; estates in severalty, in joint tenancy and in common; absolute and conditional, legal and equitable estates; etc.

CHAPTER XVI.

TITLES TO REAL PROPERTY: Covering title by descent and by purchase, classification and forms of deeds, etc.

CHAPTER XVII.

PERSONAL PROPERTY: Real and personal chattels, ownership of personal property, acquisition of title, etc.

CHAPTER XVIII.

SUCCESSION AFTER DEATH: Testate and intestate succession, escheat, executors and administrators, etc.

CHAPTER XIX.

CONTRACTS: Definition, validity and classification of contracts, quasi contracts, etc.

CHAPTER XX.

SPECIAL CONTRACTS: Covering contracts of sale, bailments, negotiable contracts, suretyship, insurance, etc.

CHAPTER XXI.

AGENCY: Covering the subject generally.

CHAPTER XXII.

COMMERCIAL ASSOCIATIONS: Covering partnerships, joint stock companies, voluntary associations, corporations, etc.

CHAPTER XXIII.

TORTS: Covering the nature and elements of torts, proximate and remote cause and specific torts.

Part III—THE ADJECTIVE LAW.

CHAPTER XXIV.

REMEDIES: Extralegal and legal, penal and civil, common law and equitable, ordinary and extraordinary remedies.

CHAPTER XXV.

COURTS AND THEIR JURISDICTION: Covering the subject generally.

CHAPTER XXVI.

PROCEDURE: In general; outlines of common law, equity, code, and criminal procedure.

CHAPTER XXVII.

TRIALS: Early forms, trial procedure, evidence.

1 VOL. 367 PAGES. \$3.75, DELIVERED.

WEST PUBLISHING CO ST PAUL MINN

(The Hornbook Series.)

A Handbook of The Law of Damages,

By Wm. B. Hale,

Author of "Bailments and Carriers."

TABLE OF CONTENTS.

CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES: Definition, nature and theory of damages; wrong and damage; analysis of legal wrongs; classification of damages.

CHAPTER II.

NOMINAL DAMAGES: Definition and general nature.

CHAPTER III.

COMPENSATORY DAMAGES: Definition; proximate and remote consequences; direct and consequential losses; avoidable consequences; certainty of damages; profits; entirety of demand; past and future losses; elements of compensation; aggravation and mitigation of damages; reduction of loss; injuries to limited interests, etc.

CHAPTER IV.

BONDS, LIQUIDATED DAMAGES AND ALTERNATIVE CONTRACTS: Covering the subject generally.

CHAPTER V.

INTEREST: Definition; as a debt and as damages; interest on liquidated and unliquidated demands; on overdue paper,—contract and statute rate, compound interest; etc.

CHAPTER VI.

VALUE: Definition; how estimated; market value; pretium affectionis; value peculiar to owner; time and place of assessment; highest intermediate value; etc.

CHAPTER VII.

EXEMPLARY DAMAGES: In general; when recoverable; liability of principal for act of agent; etc.

CHAPTER VIII.

PLEADING AND PRACTICE: Allegation of damage, the ad damnum, form of statement, province of court and jury, etc.

CHAPTER IX.

BREACH OF CONTRACTS FOR SALE OF GOODS: Damages in action by seller for non-acceptance and non-payment; damages in action by buyer for non-delivery, breach of warranty, and as for conversion.

CHAPTER X.

DAMAGES IN ACTIONS AGAINST CARRIER: Carriers of goods,—refusal to transport, non-delivery, injury in transit, delay, consequential damages; carriers of passengers,—injuries to passenger exemplary damages, mental suffering, delay, wrongful ejection, etc.

CHAPTER XI.

DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES: Actions by sender and by receiver; proximate and certain, remote and speculative damages; notice of purpose and importance of message; cipher messages; avoidable consequences; exemplary damages; etc.

CHAPTER XII.

DAMAGES FOR DEATH BY WRONGFUL ACT: Pecuniary losses; mental suffering; exemplary damages; injury to deceased; medical and funeral expenses; meaning of pecuniary,—care and support, prospective gifts and inheritances; interest as damages; discretion of jury; nominal damages, etc.

CHAPTER XIII.

WRONGS AFFECTING REAL PROPERTY: Damages for detention of real property; trespass; nuisance; waste; contract to sell real property,—breach by vendor or vendee; breach of covenants, etc.

CHAPTER XIV.

BREACH OF MARRIAGE PROMISE: In general, compensatory damages, exemplary damages, etc.

1 VOL. 476 PAGES. \$3.75, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of The Law of Real Property.

By Earl P. Hopkins, A. B., LL. M.

TABLE OF CONTENTS.

Chapter I. WHAT IS REAL PROPERTY: Real and personal property, fixtures, equitable conversion, personal interests in land.	Chapter X. EQUITABLE ESTATES: Statute of uses, classification of trusts,—express, implied, resulting, constructive,—incidents of equitable estates, charitable trusts.
Chapter II. TENURE AND SEISIN.	Chapter XI. ESTATES AS TO TIME OF ENJOYMENT—FUTURE ESTATES: Reversions, possibilities of reverter, remainders, rule in Shelley's Case, future uses, springing uses, shifting uses, executory devises, incidents of future estates.
Chapter III. ESTATES AS TO QUANTITY—FEE SIMPLE: Classification of estates, freehold, fee-simple, creation, right of user and alienation.	Chapter XII. ESTATES AS TO NUMBER OF OWNERS—JOINT ESTATES: Joint tenancies, tenancies in common, estates in coparcenary, estates in entirety, estates in partnership, incidents of joint estates, partition.
Chapter IV. ESTATES AS TO QUANTITY (Continued)—ESTATES TAIL: Classes, origin, creation, incidents, duration, tenant in tail after possibility of issue extinct, estates tail in the United States, quasi entail.	Chapter XIII. INCORPOREAL HEREDITAMENTS: Easements, creation, classification, incidents, destruction, rights of way, highways, light and air, lateral and subjacent support, party walls, easements in water, profits a prendre, rents, franchises.
Chapter V. ESTATES AS TO QUANTITY (Continued)—CONVENTIONAL LIFE ESTATES: Life estates, creation, conventional life estates, incidents, estates per autre vie.	Chapter XIV. LEGAL CAPACITY TO HOLD AND CONVEY REALTY: Infants, persons of unsound mind, married women, aliens, corporations.
Chapter VI. ESTATES AS TO QUANTITY (Continued)—LEGAL LIFE ESTATES: Estate during coverture, curtesy, dower, homestead, federal homestead act.	Chapter XV. RESTRAINTS ON ALIENATION: Restraints imposed by law, restraints in favor of creditors, restraints imposed in creation of estate.
Chapter VII. ESTATES AS TO QUANTITY (Continued)—LESS THAN FREEHOLD: Estates for years, letting land on shares, tenancies at will, tenancies from year to year, letting of lodgings, tenancies at sufferance, licenses.	Chapter XVI. TITLE: Acquisition of title by state and private persons, grant from state, conveyances, common-law conveyances, conveyances under statute of uses, modern statutory conveyances, registered titles, requisites of deeds; covenants for title, seisin, against incumbrances, warranty, further assurance; estoppel, adverse possession, accretion, devise, descent, judicial process; conveyances under licenses, under duress; tax titles, eminent domain.
Chapter VIII. ESTATES AS TO QUALITY ON CONDITION—ON LIMITATION: Estates on condition, estates on limitation, base fees.	
Chapter IX. ESTATES AS TO QUALITY (Continued)—MORTGAGES: Parties, nature, form, rights and liabilities of mortgagor and mortgagee, assignment of the equity of redemption, assignment of the mortgage, priority of mortgages and other conveyances, registration, discharge of a mortgage.	

1 VOL. 589 PAGES. \$3.75, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of The Law of Persons and Domestic Relations,

By Walter C. Tiffang.

TABLE OF CONTENTS.

PART I.

HUSBAND AND WIFE.

Chapter I.

MARRIAGE: Covering definition and essentials; capacity of parties; reality of consent; formalities in celebration; annulment and avoidance; validating acts; conflict of laws, etc.

Chapter II.

PERSONS OF THE SPOUSES AS AFFECTED BY COVERTURE: Covering rights inter se; crimes and torts of married women; crimes and torts as between husband and wife; torts against married women; actions for alienation of affections; crim. con., etc.

Chapter III.

RIGHTS IN PROPERTY AS AFFECTED BY COVERTURE: Covering wife's earnings; wife's choses in action and in possession; wife's chattels real; administration of wife's estate; equitable and statutory separate estate; community property; curtesy; dower; estates by the entirety, etc.

Chapter IV.

CONTRACTS, CONVEYANCES, ETC., AND QUASI-CONTRACTUAL OBLIGATIONS: Covering, inter alia, husband's liability for wife's necessities, antenuptial debts, and funeral expenses; wife as a sole trader; wife as husband's agent; conveyances, sales, and gifts by the wife, etc.

Chapter V.

WIFE'S EQUITABLE AND STATUTORY SEPARATE ESTATE: Covering their nature; jus disponendi; power to charge by contract, etc.

Chapter VI.

ANTENUPTIAL AND POSTNUPTIAL SETTLEMENTS: Covering the subject generally, including marriage as a consideration; the statute of frauds; validity against creditors and purchasers, etc.

Chapter VII.

SEPARATION AND DIVORCE: Covering agreements for separation; jurisdiction to grant divorce; grounds for divorce; defenses in actions for divorce; legislative divorce, etc.

PART II.

PARENT AND CHILD.

Chapter VIII.

LEGITIMACY, ILLEGITIMACY, AND ADOPTION: Covering legitimacy of children; adoption of children; status of illegitimate children.

Chapter IX.

DUTIES AND LIABILITIES OF PARENTS: Maintenance, protection, and education of child; allowance out of child's estate; child as parent's agent; parent's liability for crimes and torts of child, etc.

Chapter X.

RIGHTS OF PARENTS AND OF CHILDREN: Right to custody; service and earnings of child; correction of child; emancipation of children; action by parent for injuries to child; gifts, contracts, and conveyances between; advancements; duty to support parent; domicile of child, etc.

PART III.

GUARDIAN AND WARD.

Chapter XI.

GUARDIANS DEFINED — SELECTION AND APPOINTMENT: Covering natural guardians; testamentary guardians; statutory guardians; guardians by estoppel; guardians of insane persons; guardians ad litem, etc.

Chapter XII.

RIGHTS, DUTIES, AND LIABILITIES OF GUARDIANS: Right to custody and services of ward; maintenance of ward; change of ward's domicile; management of ward's estate; foreign guardians; inventory and accounts; compensation of guardian; transactions between guardian and ward, etc.

Chapter XIII.

TERMINATION OF GUARDIANSHIP — ENFORCING GUARDIAN'S LIABILITY: Covering the subject generally.

PART IV.

INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS.

Chapter XIV.

INFANTS: Covering contracts of infants, including ratification and disaffirmance; liabilities for necessities, etc.; capacity to hold office, to make a will, and as witnesses; liability for torts and crimes; infants as parties to actions, etc.

Chapter XV.

PERSONS NON COMPOTES MENTIS AND ALIENS: Covering insane and drunken persons, their contracts, their liability for torts and crimes and testamentary capacity, etc.

PART V.

MASTER AND SERVANT.

Chapter XVI.

CREATION AND TERMINATION OF RELATION: Remedies for breach of contract; rights and duties and liabilities inter se and as to third persons, etc.

(In the Hornbook Series.)

A Treatise on the Law of . . . Executors and Administrators

By Simon Greenleaf Croswell, Author of "Electricity,"
"Patent Cases," etc.

TABLE OF CONTENTS.

Part I.—DEFINITIONS AND DIVISION OF SUBJECT.

Chapter I.

DEFINITIONS AND DIVISION OF SUBJECT: Executors and administrators defined; analysis of book.

Part II.—APPOINTMENT AND QUALIFICATIONS.

Chapter II.

APPOINTMENT IN COURT: Necessity of administration; necessity of appointment by court; jurisdiction; conclusiveness of decrees of probate courts, etc.

Chapter III.

PLACE AND TIME OF APPOINTMENT AND REQUISITES THEREFOR: Place of appointment; property necessary to give jurisdiction; time limit for application.

Chapter IV.

WHO MAY CLAIM APPOINTMENT AS EXECUTOR: Designation in will; appointment by delegation; executor of executor; non-assignability of office.

Chapter V.

WHO MAY CLAIM THE RIGHT TO ADMINISTER: Principle which governs the right; order of precedence; creditors; preferences among kindred, etc.

Chapter VI.

DISQUALIFICATIONS FOR THE OFFICE OF EXECUTOR OR ADMINISTRATOR: Infants, married women, idiots, lunatics, convicts, corporations; poverty and insolvency; absolute and discretionary incompetency, etc.

Chapter VII.

ACCEPTANCE OR RENUNCIATION: Express or implied renunciation.

Chapter VIII.

PROCEEDINGS FOR APPOINTMENT OF EXECUTORS AND ADMINISTRATORS: In general.

Chapter IX.

SPECIAL KINDS OF ADMINISTRATIONS: Administration cum testamento annexo; de bonis non; during minority; pendente lite; public administrator; executor de son tort, etc.

Chapter X.

FOREIGN AND INTERSTATE ADMINISTRATION: Validity of foreign wills; territorial limit of validity of letters; principal and ancillary administration; conflict of laws; comity, etc.

Chapter XI.

JOINT EXECUTORS AND ADMINISTRATORS: Nature of estate; rights, powers and liabilities; remedies between, etc.

Chapter XII.

ADMINISTRATION BONDS: Covering the subject generally.

Part III.—POWERS AND DUTIES.

Chapter XIII.

INVENTORY—APPRAISEMENT—NOTICE OF APPOINTMENT: Covering the subject generally.

Chapter XIV.

ASSETS OF THE ESTATE: What are assets; fixtures; emblements; animals; ownership at time of death, etc.

Chapter XV.

MANAGEMENT OF THE ESTATE: Rights and liabilities of executors or administrators; collection and investment of assets, taxation, etc.

Chapter XVI.

SALES AND CONVEYANCES OF PERSONAL OR REAL ASSETS: Covering sales in general, sales of land to pay debts, power to mortgage, etc.

Chapter XVII.

PAYMENT OF DEBTS AND ALLOWANCES—INSOLVENT ESTATES: Covering priority of debts, widow's allowance, expenses of funeral and last illness, costs of administration; presentation and allowance of claims, insolvent estates, etc.

Chapter XVIII.

PAYMENT OF LEGACIES: Legacies subordinate to debts; ademption and abatement of legacies; priority between legacies and contingent, future or unknown debts; payment of legacies, interest, etc.

Chapter XIX.

DISTRIBUTION OF INTESTATE ESTATES: Order, time and mode of distribution; rights of husband, widow and next of kin, right of presentation, payment of distributive share, etc.

Chapter XX.

ADMINISTRATION ACCOUNTS: Time and manner of accounting, charges and allowances in account; commissions and compensation, etc.

Part IV.—TERMINATION OF OFFICE.

Chapter XXI.

REVOCATION OF LETTERS—REMOVAL—RESIGNATION: Covering the subject generally.

Part V.—REMEDIES.

Chapter XXII.

ACTIONS BY EXECUTORS AND ADMINISTRATORS: Power to sue before probate or grant of letters; survival of actions; actions in personal and representative capacity, etc.

Chapter XXIII.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS: Survival of actions; particular liabilities; attachment and garnishment; judgments, executions and other proceedings; order of liability of assets; suits on bonds, etc.

Chapter XXIV.

STATUTE OF LIMITATIONS—SET-OFF: General and special statute of limitations, set-off, etc.

Chapter XXV.

EVIDENCE AND COSTS: Covering the subject generally.

The Hornbook Series.

A Handbook of The Law of Private Corporations.

By WM. L. CLARK, Jr.,

Author of "Criminal Law," "Criminal Procedure," and "Contracts."

TABLE OF CONTENTS.

Chapter I.

OF THE NATURE OF A CORPORATION: Definition and creation; limited powers; attributes and incidents; corporation as a person, citizen, etc.; kinds of corporations, etc.

Chapter II.

CREATION AND CITIZENSHIP OF CORPORATIONS: Covering the subject generally, including power to create; general and special laws; ratification of claim to corporate existence; agreement between corporation and state—acceptance of charter; agreement between corporators and corporation; purpose of incorporation; corporate name, residence, and citizenship of corporation; extension of charter; proof of corporate existence, etc.

Chapter III.

EFFECT OF IRREGULAR INCORPORATION: Corporations de facto; estoppel to deny corporate existence; liability of stockholders as partners.

Chapter IV.

RELATION BETWEEN CORPORATION AND ITS PROMOTERS: Liability for expenses and services of promoters; liability on contract by promoters; liability of promoters to corporation and stockholders, etc.

Chapter V.

POWERS AND LIABILITIES OF CORPORATIONS: Express and implied powers; construction of charter; power to hold realty; contracts and conveyances, etc.

Chapter VI.

POWERS AND LIABILITIES OF CORPORATIONS (Continued): The doctrine of ultra vires.

Chapter VII.

POWERS AND LIABILITIES OF CORPORATIONS (Continued): Responsibility for torts and crimes; contempt of court.

Chapter VIII.

THE CORPORATION AND THE STATE: Charter as a contract; police power of the state; power of eminent domain; repeal and amendment of charter; taxation of corporation.

Chapter IX.

DISSOLUTION OF CORPORATIONS: How effected; equity jurisdiction; effect of dissolution, etc.

Chapter X.

MEMBERSHIP IN CORPORATIONS: Capital stock and capital; nature of corporate shares; certificates of stock; subscriptions to stock; release and discharge of subscriber, etc., covering the subject generally.

Chapter XI.

MEMBERSHIP IN CORPORATIONS (Continued): Right to inspect books and papers; right to vote; profits and dividends; increase of capital; preferred stock; watered and bonus stock; action by stockholders for injuries to corporation; expulsion of members, etc.

Chapter XII.

MEMBERSHIP IN CORPORATIONS (Continued): Covering transfer of shares.

Chapter XIII.

MANAGEMENT OF CORPORATIONS—OFFICERS AND AGENTS: Powers of majority of stockholders; by-laws; stockholders' meetings; election and appointment of officers and agents; powers and liabilities of officers and agents; removal of officers and agents, etc., covering the subject generally.

Chapter XIV.

RIGHTS AND REMEDIES OF CREDITORS: Relation between creditors and the corporation, covering, inter alia, property subject to execution; assets as a trust fund for creditors; fraudulent conveyances; assignment for benefit of creditors; preferences; dissolution, injunction, and receivers; relation between creditors and stockholders, covering, inter alia, statutory liability of stockholders; contribution between stockholders, etc.; relation between creditors and officers, covering preferences to officers who are creditors; statutory liability of officers.

Chapter XV.

FOREIGN CORPORATIONS: Covering the subject generally.

APPENDIX.

The logical conception of a corporation.

1 Volume. 740 pages. \$3.75, net, delivered.

West Publishing Co., St. Paul, Minn.

The Hornbook Series.

A Handbook of The Law of Partnership

By William George.

TABLE OF CONTENTS.

Chapter I.

DEFINITION AND ESTABLISHMENT OF RELATION: What constitutes a partnership; tests of intention; sharing profits; promoters of corporations; defective corporation; delectus personarum; subpartnerships; holding out, etc.

Chapter II.

KINDS OF PARTNERSHIPS AND PARTNERS: Classification of partnerships and partners; universal, general, and special partnerships; limited partnerships; joint-stock companies; mining partnerships; trading and nontrading partnerships, etc.

Chapter III.

CHARACTERISTIC FEATURES OF PARTNERSHIPS: Legal and mercantile view of a firm; partnership name; partnership property; partnership capital; shares in partnerships, etc.

Chapter IV.

IMPLIED RIGHTS AND LIABILITIES INTER SE: Participation in management; rights and powers of majority; duty to exercise care, skill, and good faith; right to compete with firm; compensation for services; interest on balances; partner's lien; division of profits, etc.

Chapter V.

ARTICLES OF PARTNERSHIP: Purpose and effect; rules of construction; usual clauses in articles, etc.; covering the subject generally.

Chapter VI.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS: Express and implied authority of partner to bind firm; particular powers; liability of partners to third persons; incoming partners; assumption of debts; rights in firm and separate property, etc.

Chapter VII.

ACTIONS BETWEEN PARTNERS: Action on partnership claim or liability, at law, in equity, or under the code; actions between firms with a common member; actions on individual obligations; equitable actions in general; accounting and dissolution; specific performance; injunction; receivers, etc.

Chapter VIII.

ACTIONS BETWEEN PARTNERS AND THIRD PERSONS: Parties in actions by and against partners; effect of changes in firm; disqualification of one partner to sue; action in firm name, etc.

Chapter IX.

DISSOLUTION: Causes of dissolution; partnerships for a definite and indefinite time; causes subject to stipulation; causes not subject to stipulation; causes for which a court will decree a dissolution; consequences of dissolution as to third persons and as to partners.

Chapter X.

LIMITED PARTNERSHIPS: Covering the subject exhaustively, including, inter alia, definition and establishment of relation; general and special members; certificate; contribution of general and special partners; name; sign; rights and liabilities; withdrawal, alteration, and interference; insolvency; termination of relation; change from limited to general liability; actions, etc.

Chapter XI.

JOINT-STOCK COMPANIES: Definition and nature; transfer of shares; powers of members and officers; rights and liabilities; actions, etc.

1 Volume, 616 pages. \$3.75, net, delivered.

West Publishing Co., St. Paul, Minn.

(In the Hornbook Series.)

A Handbook of Equity Pleading.

By **Benj. J. Shipman, LL. B.,**
Author of "Shipman's Common-Law Pleading."

TABLE OF CONTENTS.

Chapter I.

EQUITY PLEADING IN GENERAL: Covering nature and scope of pleadings in equity.

Chapter II.

PARTIES: Giving general rules, and covering classification of parties as necessary, proper but not indispensable, formal, and parties with separable interests; parties complainant and respondent; joinder, etc.

Chapter III.

PROCEEDINGS IN AN EQUITABLE SUIT: Indicating the steps usually taken and the method of procedure, as the bill, appearance, proceedings on default; the modes of defense, by disclaimer, demurrer, plea, or answer; the replication; interlocutory proceedings, as amendment, injunctions, production of documents, intervention; the evidence, hearing, and decree; the correction, reversal, or enforcement of decrees, etc.

Chapter IV.

BILLS IN EQUITY: Covering definition and classification, and discussing original bills, and bills not original, with a summary of the general rules covering the bill, etc.

Chapter V.

THE DISCLAIMER: Definition, nature, and use.

Chapter VI.

DEMURRER: Definition; form of demurrer, and grounds therefor; orders sustaining or overruling demurrer, etc.

Chapter VII.

THE PLEA: Definition, nature, and office of pleas, grounds for pleas, their form, supporting answers, etc.

Chapter VIII.

THE ANSWER: Nature and office, substance and effect, of the answer, and the characteristics thereof.

Chapter IX.

THE REPLICATION.

644 PAGES. \$3.75, NET, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of The Law of Evidence.

By John Jay McKelvey, A. M., LL. B.,

Author of "Common-Law Pleading," etc.

TABLE OF CONTENTS.

CHAPTER I. INTRODUCTORY: Definitions; origin, place and function of the law of evidence, etc.	CHAPTER IX. CHARACTER: General rule; when material; how proved, etc.
CHAPTER II. JUDICIAL NOTICE: The doctrine in general; facts which may or must be noticed.	CHAPTER X. OPINION EVIDENCE: Matter of opinion distinguished from matter of fact; general rule; exceptions; matters forming subject of expert opinion, etc.
CHAPTER III. QUESTIONS OF LAW AND QUESTIONS OF FACT: Definitions; province of court and jury.	CHAPTER XI. HEARSAY: General rule; exceptions; real and apparent; classes of statements admitted because of the difficulty of other proof.
CHAPTER IV. BURDEN OF PROOF: Burden of proof never shifts; burden of proceeding may shift; verdict, etc.	CHAPTER XII. WITNESSES: Rules excluding witnesses; persons excluded; privilege distinguished from disqualification; privileged persons.
CHAPTER V. PRESUMPTIONS: Presumptions as rules of law; prima facie, conclusive, spurious, and conflicting presumptions.	CHAPTER XIII. EXAMINATION OF WITNESSES: Ordinary method; refreshing memory; direct and cross examination; leading questions; impeaching witness, etc.
CHAPTER VI. ADMISSIONS: Direct and indirect admissions; admissibility; civil and criminal cases; effect of admission, etc.	CHAPTER XIV. WRITINGS: Best evidence rule; production of documents; authentication of documents; proof of handwriting; evidence affecting the contents of documents, etc.
CHAPTER VII. CONFESSIONS: Defined; voluntary or under influence; may be explained; evidence therefrom, etc.	CHAPTER XV. DEMURRERS TO EVIDENCE: Definition; when joinder compelled; final form, etc.
CHAPTER VIII. MATTERS EXCLUDED AS UNIMPORTANT, OR AS MISLEADING, THOUGH LOGICALLY RELEVANT: Logical and legal relevancy; rule excluding; classification of matter; proof of diverse matters considered.	

1 vol. 480 pages. \$3.75, net, delivered.

WEST PUBLISHING CO., St. Paul, Minn.

(The Hornbook Series.)

A Handbook of The Law of Negligence,

By Morton Barrows, A. B., LL. B.

TABLE OF CONTENTS.

Chapter I.

DEFINITION AND ESSENTIAL ELEMENTS: Considering also proximate cause; efficient, intervening, or co-operating cause, etc.

Chapter II.

CONTRIBUTORY NEGLIGENCE: Definition and general rule; degree of care; assumption of risk and legal status of plaintiff; plaintiff's negligence; negligence of third persons; imputed negligence; physical condition as an element; evidence, pleading, and questions of fact.

Chapter III.

LIABILITY OF MASTER TO SERVANT: Duty of master, as to appliances, selecting servants, rules, etc.; limitation of master's duty; ordinary risks, known dangers, fellow servants; concurrent and contributory negligence.

Chapter IV.

LIABILITY OF MASTER TO THIRD PERSONS: Relationship; independent contractor; willful torts of servants, and independent torts.

Chapter V.

COMMON CARRIERS OF PASSENGERS: The relation of passenger and carrier; termination of relation; who are passengers; the contract, ticket, compensation, etc.

Chapter VI.

CARRIERS OF GOODS: Definition; liability for loss or damage; liability for delay; contracts limiting liability in special states; limiting time and manner of making claims; construction of limiting contracts; actual notice; special classes of goods, as live stock and baggage; beginning and termination of liability; excuses for nondelivery.

Chapter VII.

OCCUPATION AND USE OF LAND AND WATER: Duties,—general rule; lateral support; dangerous premises; landlord and tenant, and condition of rented premises; water courses; dams; obstruction of navigable streams, etc.

Chapter VIII.

DANGEROUS INSTRUMENTALITIES: Railroads; degree of care exacted; signals; care required of persons; collisions with persons and with animals; fires; intentional, accidental, and railroad fires; animals; communicating disease; firearms, explosives, poisons, etc.

Chapter IX.

NEGLIGENCE OF ATTORNEYS, PHYSICIANS, AND PUBLIC OFFICERS: Negligence of attorneys; damage essential to liability; negligence of physicians; burden of proof, evidence, pleading, etc.; negligence of public and governmental officers, ministerial officers, sheriffs and constables, notaries public, clerks of court, and registers of deeds.

Chapter X.

DEATH BY WRONGFUL ACT: Right of action; instantaneous death, proximate cause of death, beneficiaries; damages; pleading and evidence; limitation of commencement of action.

Chapter XI.

NEGLIGENCE OF MUNICIPAL CORPORATIONS: Public and private corporations; right of action; liability for injuries; alteration of grades; acts of officers or agents; acts ultra vires; judicial or legislative duties; conflagrations and destruction by mobs; public health and sanitation; quasi municipal corporations.

1 VOL. 634 PAGES. \$3.75, DELIVERED.

WEST PUBLISHING CO., St. Paul, Minn.

The Hornbook Series.

THE ALBANY LAW JOURNAL, in a recent review of one of the volumes of the Hornbook Series, writes:

"So much has been written upon the merits of the Hornbook Series that anything additional may seem superfluous; yet we cannot refrain from commenting, in passing, upon the general utility, merit, and scope of the series. * * * The series is of untold value to the practicing lawyer, enabling him to find and refresh his mind in an instant upon any fundamental principle or variation therefrom of which he may be in doubt, and furnishing an ever-ready and convenient digest of the law."

This emphasizes the fact, which has also been practically recognized by the members of the bar who have examined the volumes issued under this name, that, although low in price, they are not, in consequence, cheap books. They are elementary in the sense that they deal with the elementary branches of law, but they are not by any means elementary in the sense that they fail to give the comprehensive handling which the practitioner, as distinguished from the law student, requires. In planning the style and character of this series, the controlling idea was that any principle of law could be stated in simple and intelligible terms, if the man who made the statement understood the principle, and knew how to express himself. It was to some extent an attack upon the old theory that a certain amount of obscurity in a legal document heightened the effect of learning. It was maintained, instead, that any legal principle could be stated in simple and intelligible terms, and each separate branch of the law, if carefully studied with this in view, could be mapped out so that the fundamental principles involved could be shown in an orderly sequence, and in their relation to each other. The soundness of the theory has been shown by the success of the Hornbook Series. The several volumes have been prepared by different authors, carefully chosen from the field of legal writers, with the object of securing thorough and expert treatment of the particular subject assigned in each instance. The method of presentation was at first considered a novel one, but has now become so well known, through the seventeen works issued, that the Albany Law Journal could refer to it in the terms quoted at the beginning of this notice. The books have been found so exact in statement, so convenient in arrangement, and so unmistakably clear in style, that they have been adopted as the basis of instruction in over seventy law schools. At the same time, they have been found by practitioners to be exactly the kind of book that a practitioner needs to have on his desk for current reference. He presumably knows the law, yet he often desires to refresh his memory regarding some special branch before he takes up a case involving questions relating to it, and for that purpose the arrangement of black-letter paragraphs for the statement of principles is peculiarly convenient. At the same time, the exceptions and modifications of these principles are stated in a different type, so that it is possible for him to go into details of any question when he desires to do so. The authorities are grouped in notes at the foot of the page, and their completeness is evidenced by such testimony as the following:

"I found upon page 58 of this small volume [Clark's Criminal Law], in a small compass, a statement of the divergent views, and a collation of the authorities pro and con [on a certain question], all contained in a more condensed and satisfactory form than I have found in any other treatise."—Hon. J. M. Dickinson, Asst. U. S. Atty. Gen.

"I found in Clark's Criminal Procedure, under 'Jurisdiction,' authorities regarding the question of asportation, for which I had on a previous occasion spent months of patient search. Fetter on Equity has also already paid for itself many times over."—U. S. G. Pitzer, Prosecuting Attorney, Martinsburg, W. Va.

Stanford Law Library



3 6105 062 008 094